



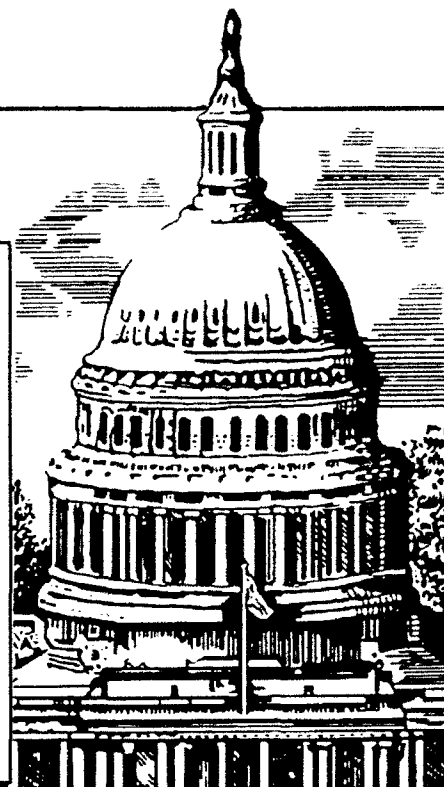
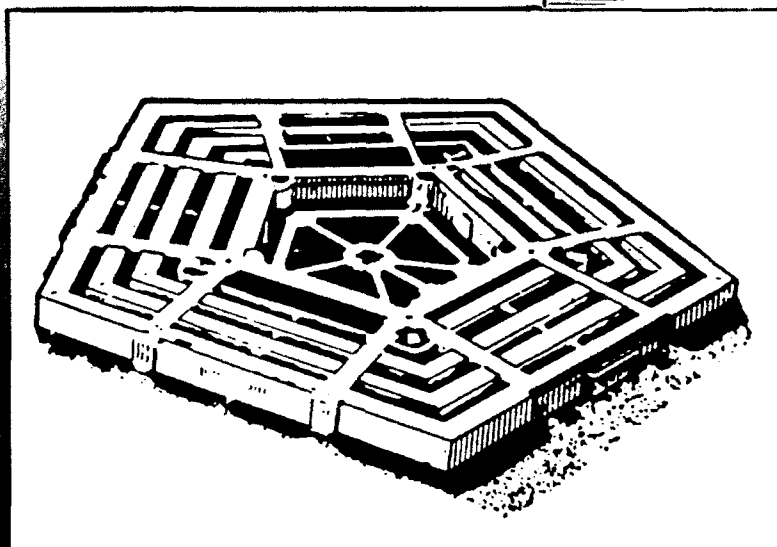
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STREAMLINING DEFENSE ACQUISITION LAWS

EXECUTIVE SUMMARY:
REPORT OF THE DOD ACQUISITION LAW ADVISORY PANEL



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DEPARTMENT OF DEFENSE
DEFENSE SYSTEMS MANAGEMENT COLLEGE
OFFICE OF THE COMMANDANT
FORT BELVOIR, VIRGINIA 22060-5426



This document summarizes the Report of the Department of Defense Acquisition Law Advisory Panel which was transmitted on January 14, 1993, to the congressional defense committees, as directed by § 800, Public Law 101-510. Entitled *Streamlining Defense Acquisition Laws*, the Report consisted of over 1,800 pages, reflecting the results of more than 16 months of intense effort by the Panel to fulfill the requirements of its charter. This monumental study presented the Panel's recommendations on over 600 statutes — each affecting the defense acquisition process in some way — that were selected for review. The Panel members, while proud of the effort which produced this Report, also recognized the need for an additional publication to highlight their principal findings and recommendations for the diverse and often divergent communities who are important stakeholders in defense and other government procurement matters.

This executive summary is intended to meet that need. It reflects the Panel's fundamental goals and objectives, both in conducting the study and in presenting their recommendations for specific and far-reaching changes in the acquisition laws. It also underlines the Panel's consistent concern in addressing defense acquisition as a coherent system. Most importantly, however, the executive summary has been written in a way which highlights the Panel's Report but is in no way intended to replace it. It is important that the reader take advantage of the extensive references to the Report included in the summary, both for the definitive statements of the Panel's recommendations and as the basis for considering actions in response to those recommendations. It is also important to point out that neither the Report nor this summary represent official positions of the U.S. government or the Department of Defense.

Let me emphasize to every reader my personal pride in the extremely dedicated work of our Panel members, as well as the joint military and civilian staff assembled at the Defense Systems Management College, who supported them with great professionalism and dedication. I also want to express on behalf of the Panel our particular thanks to Lieutenant Colonel Kenneth Allard, U.S. Army, for his efforts in preparing and editing this summary. We are also grateful for the assistance provided to those efforts by the task force and DSMC staff members listed on page ix.

While the Panel's recommendations will certainly provoke spirited debate as well as thoughtful consideration, there should be no doubt that all who have been associated with this effort have done their utmost to provide the Congress with their best judgments on these difficult and complex issues. To quote from the Introduction to our Report, we hope that those recommendations will contribute to the development of a more efficient procurement system, "one that is capable of meeting any future challenge to American national security."

W. L. Vincent
RADM, USN
Chairman, DOD Advisory Panel
on Streamlining and
Codifying Acquisition Law

PANEL MEMBERS

Pete Bryan
Director, Contract Policy & Administration
Office of the Secretary of Defense

Allan Burman
Administrator for Federal Procurement Policy

Anthony Gamboa
Deputy General Counsel
Department of the Army

Jack Harding
Vice President, Contracts, Raytheon Corporation

LeRoy Haugh
Vice President, Procurement & Finance
Aerospace Industries Association

Thomas J. Madden
Partner, Venable, Baetjer, Howard and Civiletti

Ralph Nash, Jr.
Professor of Law
George Washington University

F. Whitten Peters
Partner, Williams and Connolly

Gary Quigley
Deputy General Counsel
Defense Logistics Agency

Major General John D. Slinkard, USAF
Deputy Chief of Staff for Contracting
Headquarters, Air Force Materiel Command

Rear Admiral W. L. Vincent, USN
Commandant
Defense Systems Management College

Robert D. Wallick
Partner, Steptoe & Johnson

Harvey Wilcox
Deputy General Counsel
Department of the Navy

TASK FORCE

Executive Secretary

Donald M. Freedman (DSMC)

Task Force Directors

*C. Kenneth Allard, LTC(P), USA (DSMC)

*Thomas J. Dolan, Jr. (ONR)

*Susan P. McNeill, Col, USAF

Task Force Members

JoAnne L. Barreca (DLA)

*Benjamin B. C. Capshaw, LCDR, USNR (DSMC)

James Cohen, Lt Col, USAF

*Stuart A. Hazlett (SAF-AQC)

Barry Kline (AMC)

C. Jean Kopala, Maj, USAF (DSMC)

William E. Mounts (Contract Counsel)

Karen O'Brien, CPT, USA (DSMC)

Michael J. Renner, Lt Col, USAF

Michael Rose, Lt Col, USAFR

Diane M. Sidebottom (DLA)

James Wayne Skinner (NAVSUP)

Jack L. Soesbe, MAJ, USA (DSMC)

Theresa M. Squillacote (DSMC)

Jerry Stahl (AMC)

Donald J. Suda (DLA)

*Bruce N. Warner (DSMC)

Administrative Staff

Wilma J. Frey (DSMC)

Laura J. Neal (DSMC)

Linda L. Snellings (DSMC)

Megan A. Weaver (DSMC)

*Denotes Task Force members who assisted in the production of the Executive Summary. The Panel also recognizes the following DSMC staff members for their contributions to this effort: Robert W. Ball, Greg T. Caruth, and Francis N. Scavotto.

I

INTRODUCTION

Background

Hundreds of individual laws create the underpinnings of the defense acquisition system. Large and small, significant and trivial, new and old, these laws emanate from the fundamental Constitutional responsibility of the Congress "To raise and support Armies (and) . . . To provide and maintain a Navy." With the passage of the National Defense Authorization Act for FY 1991, Congress declared that the time had come to start the process of rationalizing, codifying, and streamlining this body of laws. Section 800 of that Act directed the official responsible for administering DOD acquisition law and regulation — the Under Secretary of Defense for Acquisition — to appoint an advisory panel of government and private-sector experts. Under the leadership of the Commandant of the Defense Systems Management College,¹ this panel was to review all laws affecting DOD procurement, "with a view toward streamlining the defense acquisition process," and to issue a report for transmission by the Secretary of Defense to the Congress in January 1993. The report was to be a practical plan of action for moving from present law to an understandable code, and was to contain specific recommendations to Congress to: eliminate any laws "unnecessary for the establishment of buyer and seller relationships in procurement;" ensure the "continuing

financial and ethical integrity" of defense procurement programs; and "protect the best interests of the Department of Defense." Finally, the panel was asked to "prepare a proposed code of relevant acquisition laws."²

Maintaining a fair, efficient, and open system of defense procurement has been a fundamental public policy since the earliest days of the Republic, as well as a specific congressional goal since DOD was created by the National Security Act of 1947. In the decades that followed, six major executive branch commissions separately examined the perennial problem of defense management. One of them, the President's Blue Ribbon Commission on Defense Management headed by David Packard, provided a comprehensive analysis of the major problem areas affecting defense management. It also made a specific recommendation to recodify the federal laws governing procurement:

... the legal regime for defense acquisition is today impossibly cumbersome. . . . At operating levels within DOD, it is now virtually impossible to assimilate new legislative or regulatory refinements promptly or effectively. For these reasons, we recommend that Congress work with the Administration to recodify Federal laws governing procurement into a single,

¹ The Defense Systems Management College is a DOD educational institution which has, since 1971, trained program managers and program executives from the uniformed services, defense industry, and other branches of the federal government.

² Pub. L. No. 101-510, § 800, 104 Stat. 1587. See H.R. CONF. REP. NO. 923, 101st Cong., 2d Sess. 107 (1990) to accompany H.R. 4739 (National Defense Authorization Act for FY 1991).

consistent, and greatly simplified procurement statute.³

Although the Packard Commission's recommendations attracted wide public attention, they failed to prompt the sweeping legislative changes that many had thought possible. A 1988 congressional report noted that the Packard Commission's status as the sixth major study of defense acquisition over four decades meant that it was merely the latest to address continuing problem areas in defense procurement. As House Armed Services Committee Chairman Les Aspin stated in his foreword to the report, "Perhaps the next executive commission on acquisition should be created, not to propose the reforms, but to implement them."⁴ In June 1989, Secretary of Defense Dick Cheney set forth just such a plan in his Defense Management Review (DMR), an ambitious effort not only to implement the recommendations of the Packard Commission, but to provide a framework for continuing improvements in Pentagon acquisition practices.⁵ This executive-legislative branch partnership was implicitly recognized by the Senate in approving the legislation which authorized the formation of the "Advisory Panel on Streamlining and Codification of the Acquisition Laws" (hereafter, the Panel).

The Packard Commission and Secretary Cheney's Defense Management Review represent the most recent efforts to promote efficiency in Government procurement practices. The purpose of this Advisory Panel will not be to plow the same ground as previous studies; rather, it will be to take the general principles set forth in these studies and prepare a pragmatic, workable set of recommended changes to the acquisition laws.⁶

Strategic Changes

The authorization of the Panel took place in the midst of fundamental changes in the international security environment, highlighted by the unification of Germany, the transformation of Eastern Europe, and the breakup of the Soviet Union. These strategic changes had profound implications for the American defense establishment. Not only could U.S. military forces be reduced, but some of the money spent on defense could be redirected toward other national priorities. Those changes in turn had equally profound implications for the Panel. The dramatic reductions in defense spending were sufficient by themselves to create a presumption that the acquisition system of the future would demand better management by fewer people of far fewer tax dollars. "Better" in this case was synonymous with the simpler, more flexible, and more responsive procedures needed to match the sweeping personnel reductions and management realignments that had become the order of the day. In its review, therefore, the Panel had a clear obligation to seek out legislative reforms which would enable both government and industry to operate more efficiently with reduced budgets.

Other major influences upon the Panel's deliberations were the changes occurring in the defense industrial base. A study by the Air Force Association noted that the industrial base which supported Operation Desert Storm

... no longer exists. Even as the nation watched the war on television, the companies that produced the impressive weapons were releasing workers, closing plants, and searching for nondefense business.⁷

³ *A Quest for Excellence: Final Report by the President's Commission on Defense Management* 55 (June 1986).

⁴ Defense Policy Panel and Acquisition Policy Panel of the H.R. Comm. on Armed Services, 100th Cong., 2d Sess., *Defense Acquisition: Major U.S. Commission Reports (1949-1988)* (Comm. Print 1988), vii.

⁵ U.S. Dep't of Defense, *Defense Management Report to the President by Secretary of Defense Dick Cheney* (1989).

⁶ S. REP. NO. 384, 101st Cong., 2d Sess. 819 (1990) to accompany S. 2884 (National Defense Authorization Act for FY 1991).

⁷ Air Force Ass'n., Arlington, Va., *Lifeline Adrift: The Defense Industrial Base in the 1990's* i (1991).

This exodus from the defense marketplace was not due solely to the downturn in defense spending:

Firms, particularly subcontractors and suppliers of system components, are moving from defense to the commercial market, where the profits are better and where business is conducted in a more stable, less adversarial manner.⁸

Two congressional studies completed in the aftermath of the Gulf War simultaneously praised the performance of U.S. weapons systems but cited the burden of regulatory controls imposed through the DOD acquisition system as an important factor in the decline of the industrial base.⁹

While the Panel's charter called for legislative rather than regulatory reform, there is an important linkage, often missed in public and congressional criticism of DOD contracting methods: many of the regulations which impose the most burdensome controls are specifically mandated by statute.¹⁰ This "missing link" between law and regulation was addressed in a study specially prepared for the Panel by the American Defense Preparedness Association (ADPA). It found that acquisition laws represented the apex of a "cascading pyramid" of restrictive regulations, overly detailed military specifications, and common procurement practices that typically added 30-50 percent to the costs of doing business with the Department of Defense.¹¹

Although these costs have customarily been measured in both time and money, they also impede technological innovation. Ironically, it is technological sophistication which has characterized American weapons development for more than a generation, and is an essential component of our continued military superiority. It is also important to remember that these laws are part of a system that has been successfully applied for almost a half century to procure the weapons and materiel used by American armed forces in actual combat in Korea, Vietnam, and the Persian Gulf, as well as a host of Cold War confrontations. By the early 1990s, however, this record of success could not completely offset a growing concern among lawmakers and procurement experts who worried about the system's ability to respond to future scientific challenges. For one thing, the procurement process typically operated at a far slower pace than the technological developments it sought to capture. Worse yet, it imposed bureaucratic requirements which were so unique and intrusive (e.g., cost accounting standards) that many contractors totally separated their government and commercial production facilities. These barriers not only added to the costs of doing business with the government, but they also "walled off" the rapid advances being made in commercial research and development from easy exploitation and use in military systems.

A particularly vivid example of this barrier occurred during the Gulf War. According to a story cited by Donald A. Hicks, a former Under

⁸ *Id.*

⁹ Office of Technology Assessment, U.S. Congress, *Redesigning Defense: Planning the Transition to the Future U.S. Defense Industrial Base*, OTA-ISC-500, (1991); H. R. Comm. on Armed Services, 102d Cong., 2d Sess., *Future of the Defense Industrial Base, Report of the Structure of U.S. Defense Industrial Base Panel* (Comm. Print 1992).

¹⁰ One notable exception to the usual "missing link" between law and regulation was provided by the report of a 1992 congressional panel studying the industrial base which charged that "Defense Department provisions requiring compliance with Government Cost Accounting Standards and the Truth in Negotiations Act are serious impediments to commercial companies wishing to sell to the department." H.R. Comm. on Armed Services, 102d Cong., 2d Sess., *Future of the Defense Industrial Base, Report of the Structure of U.S. Defense Industrial Base Panel* 13 (Comm. Print 1992).

¹¹ George K. Krikorian, presentation to the Acquisition Law Advisory Panel, Ft. Belvoir, Va. (June 3, 1992). See also Mr. Krikorian's statement before the House Armed Services Committee Subcommittee on Investigations, July 22, 1991, and his article, *DOD's Cost Premium Thirty to Fifty Percent*, *National Defense* (Journal of the American Defense Preparedness Association) 12-13 (Sept. 1992).

Secretary of Defense for Research and Engineering, the U.S. Army placed an emergency order for 6,000 commercial radio receivers, waiving all military requirements and specifications. Because of the urgency of preparations for war — as well as the ever-present threat of second-guessing once that urgency had faded — no responsible procurement official could be found who would waive the requirement for the company to certify that the Army was being offered the lowest available price. Since the radio was widely marketed and any misstatement might constitute a felony, no company official would make this certification. The impasse was resolved only when the Japanese government bought the radios without a price certification, donated them to the U.S. Army, and credited the purchase against Japan's financial contribution to Operation Desert Storm.¹²

The Gulf War demonstrated the devastating tactical effect of sophisticated weaponry of all kinds, particularly when precision munitions were coupled with advanced command and control systems. If these developments truly represent what many observers referred to as a "military technological revolution," then the innovations needed to hone the American combat edge will increasingly depend on developments in the commercial sector. A number of public and private studies have documented the need for more effective integration of commercial and military technology. These analyses have pointed out that this linkage is not only needed to ensure a stable, viable defense industrial base as government spending is reduced, but is equally important to ensure a wartime surge capability as traditional defense plants are eliminated. Recognizing this trend, Congress has given clear guidance in a series of defense authorization

bills that it too is concerned with this objective. Unfortunately, this guidance has not reduced the barriers to commercial access. The impediments to commercial-military integration, therefore, became a topic of continuing interest to the Panel, typifying in many ways the overriding need to streamline the defense procurement laws in a new era of fiscal austerity and great strategic uncertainty.¹³

Goals and Objectives

At their first meeting, the Panel members agreed that their congressional charter (Public Law 101-510, section 800) provided the following goals as the basic framework for their efforts:

- Streamline the defense acquisition process and prepare a proposed code of relevant acquisition laws.
- Eliminate acquisition laws that are unnecessary for the establishment and administration of the buyer and seller relationships in procurement.
- Ensure the continuing financial and ethical integrity of defense procurement programs.
- Protect the best interests of DOD.

During several of its initial meetings, the Panel heard testimony from a wide variety of experts representing government, the military, and industry. General officers from the military services, as well as senior civilian executives representing such key procurement elements as the Defense Logistics Agency, were also invited to testify as the Panel sought to identify the most critical problem areas. Private-sector groups,

¹² Donald A. Hicks, "Requirements for a Viable Defense Industrial Base," Speech to the Economist Conference on Defense Spending Retrenchment, London, UK (Oct. 21, 1991).

¹³ H.R. Comm. on Armed Services, 102d Cong., 2d Sess., *Future of the Defense Industrial Base, Report of the Structure of U.S. Defense Industrial Base Panel 13-16* (Comm. Print 1992). See also two reports by the Center for Strategic and International Studies, *Deterrence in Decay: The Future of the U.S. Industrial Base*, Washington, D.C. (May 1989), and *Integrating Commercial and Military Technologies for National Strength: An Agenda for Change*, Washington, D.C. (March 1991). For a DOD perspective, see Robert B. Costello, *Bolstering Defense Industrial Competitiveness*. Report by the Under Secretary of Defense (Acquisition) to the Secretary of Defense (July 1988).

such as the Council of Defense and Space Industry Associations, the American Bar Association, and the U.S. Chamber of Commerce, were also contacted during this phase of the review. Although individual perspectives varied, there was surprising agreement on the burden placed upon the acquisition community by the increasingly complex web of procurement laws. Many of these viewpoints were summarized in a timely article by Professor William E. Kovacic of George Mason University:

The perceived imperative to embrace immediate statutory cures for apparent (procurement) deficiencies in the 1980s inspired several enactments of sweeping scope and questionable draftsmanship. . . . Once adopted, such enactments typically resist subsequent retrenchment, as any suggested ex post weakening of requirements usually is successfully attacked by advocates of the original legislation as an unwarranted dilution of congressional efforts to discourage fraud and otherwise improve procurement performance. There is, in effect, an upward statutory ratchet in procurement regulation that ensures that regulatory commands become ever more restrictive.¹⁴

In the early months of the Panel's activities, its members sought to amplify their original goals and to identify more specific criteria to guide their recommendations for statutory change. The key to this effort was a broadly based pattern of outreach activities, all aimed at ensuring a review process that was open to the widest possible variety of public access and comments. Through these efforts, the Panel was able to establish from its inception a remarkably free-ranging dialogue with both the acquisition community and the general public. One of the first concrete results of that dialogue was the Panel's agreement on the 10 objectives that would help to guide its review:

(1) Acquisition laws should identify the broad policy objectives and the fundamental requirements to be achieved. Detailed implementing

methodology should be reserved to the acquisition regulations.

(2) Acquisition laws should promote financial and ethical integrity in ways that are:

- (a) Simple and understandable;
- (b) Not unduly burdensome; and
- (c) Encourage sound and efficient procurement practices.

(3) Acquisition laws should establish a balance between an efficient process and

- (a) Full and open access to the procurement system; and
- (b) Socioeconomic policies.

(4) Acquisition laws should, without alteration of commercial accounting or business practices, facilitate:

- (a) Government access to commercial technologies; and
- (b) Government access to the skills available in the commercial marketplace to develop new technologies.

(5) Acquisition laws should, without requiring contractors to incur additional costs, facilitate the purchase by DOD or its contractors of commercial or modified commercial products and services at or based on commercial market prices.

(6) Acquisition laws should enable companies (contractors or subcontractors) to integrate the production of both commercial and government-unique products in a single business unit without altering their commercial accounting or business practices.

(7) Acquisition laws should promote the development and preservation of an industrial base and commercial access to government-developed technologies.

(8) Acquisition laws should provide the means for expeditious and fair resolution of procurement disputes through uniform interpretation of laws and implementing regulations.

¹⁴ William E. Kovacic, *Regulatory Controls as Barriers to Entry in Government Procurement*, 25 POLICY SCIENCES 31 (1992).

(9) Acquisition laws should encourage the exercise of sound judgment on the part of acquisition personnel.

(10) Acquisition laws should, when generating reporting requirements, permit as much as possible the use of data that already exists and is already collected without imposing additional administrative burdens.

Approaches

Before these goals and objectives could be applied to the task of streamlining, it was necessary to define the universe of laws affecting defense acquisition. From a number of sources, the Panel initially identified over 800 provisions of law that appeared to have some relationship to DOD acquisition, a number that was gradually narrowed through several detailed reviews. Even after this screening, however, the Panel was left with a universe of over 600 DOD-related procurement laws that it was required to review in line with its congressional charter. Those numbers highlighted the importance of approaching defense acquisition as a coherent *system*. To facilitate a systemic approach and to divide the labor of reviewing so many statutes, the Panel established working groups covering six major functional areas: contract formation; contract administration; Service-specific and major systems statutes; socioeconomic requirements, small business, and simplified acquisition; standards of conduct; and intellectual property. In addition, two *ad hoc* working groups addressed commercial procurement and international defense cooperation.

Each functional working group consisted of two Panel members, one from the public sector and one from the private sector. They quickly became the focal points for research and analysis, reviewing the laws assigned to them and preparing recommendations for decision by the

Panel as a whole. In reviewing the major statutes, the working groups typically began the process with a legislative history and a literature search. Building upon the wide public contacts that had already been established, they solicited comments from the acquisition community and other interested parties, often through the use of *Federal Register* notices or questionnaires. Minutes of Panel meetings, legislative abstracts, and various position papers were also distributed through the extensive mailing and telefax lists that were eventually developed by each working group and the Panel as a whole. Specific inputs were also obtained from departmental staffs, trade associations, and governmental agencies with particular expertise, such as the Air Force Contract Law Center. Where appropriate, public meetings on issues being examined by the working groups were also held to ensure that a wide range of opinions was considered. Similarly, when specific issues were scheduled for discussion at Panel meetings, interested groups from both the public and private sectors were routinely invited to speak.¹⁵ This dialogue between the Panel, the acquisition community, and the general public was especially important in framing recommendations. The tentative decisions reached throughout this process were then reviewed *in toto* by the Panel at the conclusion of its deliberations. This "last look" was intended to ensure that the individual decisions made over many months were consistent with one another — and with the Panel's goals and objectives.

An Overview

The Panel's Report was transmitted to the defense committees of the Congress on January 14, 1993, by the Deputy Secretary of Defense. Of more than 600 laws reviewed by the Panel, almost 300 were recommended for repeal, deletion, or amendment. That remarkable total reflected the fact that, throughout its work, the

¹⁵ Examples included: the National Association of Minority Business when the Small Business Act was under discussion; the Management Reviews Division of the General Services Administration during discussion of the Brooks Act; an industry coalition, the Integrated Dual-Use Commercial Companies, during several discussions of commercial products and services; and the General Accounting Office during discussions of protests.

Panel concentrated on changes that would streamline the defense procurement process in the 1990s, when dollars are expected to be fewer, work forces smaller, and superpower security threats less urgent. The Panel's initiatives in three areas are of particular importance:

Streamlining: Addressing the Panel during one of its early meetings, Senator Jeff Bingaman suggested that there had been an unfortunate tendency in recent years for statutes to be enacted without a clear view as to their ultimate effect upon the acquisition system. His challenge to the Panel, echoed by many other observers, prompted a concerted effort to consolidate and simplify statutes in every area of its review. The detailed changes recommended for almost 300 statutes would result in a streamlined system of acquisition laws, more easily understood, administered, and implemented.

Commercial Items: The Panel recommended significant legislative changes in order to improve the Department's access to commercial technologies. Those recommendations are reflected not only in the Panel's analysis of the basic procurement statutes, such as the Truth in Negotiations Act (TINA) and the Competition in Contracting Act, but they are also addressed in an entire chapter of its Report highlighting the extensive reforms needed to enhance the acquisition of commercial items, both as end-items and as components of DOD systems.

Simplified Acquisition: There is a clear need to trim the Department's administrative overhead, not only to reduce costs and cope with change but also to anticipate the effects of current and planned personnel reductions on the acquisition work force. The Panel determined that the creation of a new "simplified acquisition threshold" — initially to be set at \$100,000 — would streamline more than 50 percent of all DOD contract actions over \$25,000, while affecting less than five percent of its contract dollars. Integral to these recommendations is a continued preference for small business, as well as measures needed to sim-

plify contract management for both the Department and its suppliers.

There is no question that the reforms recommended by the Panel would have the greatest effect were they to be passed as a comprehensive package. However, even the enactment of the major recommendations outlined in this summary would make significant progress toward the goal of streamlining and simplifying the defense acquisition system. While the improvement of that system was the primary focus of the Panel, its members fully recognized the importance of seeking government-wide consistency in procurement matters. Therefore, they hope that their recommendations can serve as a baseline for parallel changes in the legislative underpinnings of civilian agency acquisition.

The summary of the Panel's Report contained in the following pages is intended to give the reader an overview of the Panel's approach to key acquisition issues as well as specific information on the most important sources used by the Panel in many of these areas. In this overview, however, those key issues are presented in an order which differs from that used in the Report. To avoid any confusion, the Executive Summary includes references to the Report, usually by both chapter and subchapter, as an aid to the reader in referring to that document for more definitive statements of the issues outlined here.

This summary begins with a section discussing the Panel's findings on commercial items, in many ways the centerpiece of its efforts. Two closely-related areas follow in section III: a new "simplified acquisition threshold" and, because that initiative shaped the Panel's approach to this area, its recommendations on socioeconomic laws. Section IV, Contract Management, summarizes two chapters of the Panel's Report and documents the critical role played by the statutes governing contract formation and administration in all procurement functions. The Panel's findings on statutes pertaining to the defense technology and industrial base are presented in section V. Two critical acquisition issues are grouped under section VI — intellectual prop-

erty and standards of conduct. In section VII, the Panel's findings on several important groups of statutes are presented, including those unique to major systems and testing. The final section presents both the constraints which affected the

Panel's work and its conclusions on the future of the acquisition reform process. Six tables are presented in the appendix, the first of which summarizes the Panel's significant recommendations for statutory amendment or repeal.

II

COMMERCIAL ITEMS

The Panel's recommendations dealing with the acquisition of commercial products and services clearly could have a significant impact, not only on what DOD buys, but how it buys, what it pays, and the base of potential defense suppliers. The DOD uses many commercial products, but is prevented by numerous statutory requirements from buying those products like any other customer. Despite congressional encouragement to acquire commercial products whenever possible, DOD's success has been limited. The Panel determined that it was critical to reduce the barriers that make it virtually impossible for the DOD to act more like a commercial buyer. These reforms would make it possible not only to draw new firms to the defense market, but they would also enable some firms which must now maintain separate facilities and accounting systems to integrate their commercial and military production. Those changes will permit DOD to fulfill its requirements at lower costs — thus saving increasingly scarce taxpayer dollars.

In addition to other proposals throughout its Report to facilitate commercial-military integration, the Panel proposes a comprehensive new approach to the acquisition of commercial items, both as end-items and as components in defense-unique products. In so doing, the Panel drew upon legislative initiatives over the past decade and attempted to incorporate the language and concepts of those laws. Existing law has not, however, been successful in achieving the benefits of commercial-military integration and has not resulted in broad use of commercial items in DOD systems. The reasons for this are complex. While opposition to commercial items

within the defense procurement community has been cited as a factor, recent congressional and executive branch studies, expert commentary, and testimony before the Panel identified procurement statutes (and implementing regulations) themselves as a major barrier to greater use of commercial items. The Panel has responded by proposing:

- Stronger policy language favoring the use of commercial and nondevelopmental items in 10 U.S.C. § 2301;
- A new definition of commercial items in 10 U.S.C. § 2302;
- An expanded exemption for "adequate price competition" in the Truth in Negotiations Act, 10 U.S.C. § 2306a, which applies to commercial items, and relief from inappropriate requirements for cost or pricing data when a competitively awarded contract for commercial items or services is modified.
- New exemptions to technical data requirements in commercial item acquisitions in 10 U.S.C. § 2320;
- A new structure for "Buy American" restrictions in a proposed new chapter on Defense Trade and Cooperation; and
- A new subchapter for commercial item acquisitions which: creates a revised rule structure; provides for exemptions from statutes that create barriers to the use of commercial items; and includes provisions on pricing, documen-

tation, and audit rights tailored for commercial item acquisitions.¹⁶

BACKGROUND

For at least 20 years, the idea has been advanced that DOD could benefit from broader use of commercial items. In 1972, for example, the Commission on Government Procurement urged that commercial products replace government-designed items to avoid the high cost of developing unique products. Congressional direction to acquire commercial products dates to at least 1984, when the Competition in Contracting Act (CICA) was enacted, requiring federal agencies to "promote the use of commercial products whenever practicable." CICA also provides a statutory basis for multiple award schedule contracting, which has become a primary method for government purchase of commercial products. In addition, in the Defense Procurement Reform Act of 1984, Congress mandated that DOD use "standard or commercial parts" when developing or acquiring defense-specific products "whenever such use is technically acceptable and cost effective."

In June 1986, the President's Blue Ribbon Commission on Defense Management (the Packard Commission) again emphasized the benefits to DOD of using commercial items: lower costs and shorter lead times in fielding new products and systems. The Commission urged DOD to adopt policies allowing it to "make greater use of components, systems, and services available 'off-the-shelf'" and to develop "new or custom-made items only when it has been established that those readily available are clearly inadequate to meet military requirements."¹⁷

Beginning in 1989, Congress directed DOD to issue streamlined regulations governing commercial products and to rescind conflicting and inconsistent regulations.¹⁸ Although this legislation is the basis for Parts 210 and 211 of the Defense Federal Acquisition Regulation Supplement (DFARS), even the "simplified" contract described in DFARS Part 211 mandates the use of over 100 provisions as opposed to the handful of terms and conditions typically found in commercial items contracts. Most recently, the National Defense Authorization Act for FY 1993 mandated the modification of DOD acquisition policy to encourage integration of the civilian and military industrial base.¹⁹

While the course set by Congress since 1984 is plain, none of the legislation passed to date has actually caused or permitted significant increases in the procurement of commercial items by DOD. The reasons for the shortfall include:

- A uniform definition for commercial items has not been legislated. Instead, a number of conflicting definitions have been implemented in regulation.
- The Truth in Negotiations Act (10 U.S.C. § 2306a) has not been changed, a statute which greatly impedes commercial buying.
- Commercial acquisition has not been exempted from socioeconomic laws, trade restrictions, executive orders, and implementing regulations, or from the special certification and record-keeping requirements in connection with procurement integrity, costing, audit, and other requirements: all of these mandates require a commercial

¹⁶ See Chap. 1.1 of the Panel's Report (hereafter, the Report) for its recommendations on 10 U.S.C. §§ 2301 and 2302; Chap. 1.3 for 10 U.S.C. § 2306a; Chap. 5.1 for 10 U.S.C. § 2320; Chap. 7.1 for the Buy American Act; and Chap. 8, generally, for commercial item acquisitions.

¹⁷ *President's Blue Ribbon Commission on Defense Management, Final Report: A Quest for Excellence 60* (1986) [hereafter "the Packard Commission Report"].

¹⁸ National Defense Authorization Act for FYs 1990 and 1991, Pub. L. No. 101-189 § 824(b)(1), 103 Stat. 1352, 1505 (1989).

¹⁹ Pub. L. No. 102-484, 4211, 106 Stat. 2315, 2662 (1992), enacting 10 U.S.C. § 2501(c).

company to fundamentally alter the way it conducts business if it desires to sell to DOD.

In sum, many critics have consistently faulted DOD's practices and regulations for constricting the flow of commercial products, while often failing to recognize that ever-increasing legislative requirements have placed special burdens on companies solely because they contract with the federal government.

Recent studies of DOD acquisition practices have uniformly concluded that the myriad of federal laws and regulations applicable only to federal — and particularly DOD — contractors has created a significant barrier to the entry of commercial firms into federal contracting. A 1990 report on 20 case studies of how commercial companies sell to the federal government reached the following conclusions:

In general, the greater the commercial sales base [a company has], the more likely [a company] will either separate [its] commercial and military operations or *abstain from military business*. Companies such as IBM, Motorola, Boeing, Hewlett-Packard, Digital Equipment Corporation (DEC), and Intel fall into this category.²⁰

In the past, the minimal use of commercial items by DOD has often been attributed to the Department's reluctance to use its existing statutory authority. However, the proliferation during the 1980s of laws applicable only to federal contractors created legislative barriers to greater defense procurement of commercial items, primarily because these statutes require government contractors to adopt unique and expensive business practices on pain of extraordinary civil and criminal penalties. The Panel heard re-

peated testimony that mandatory, government-unique business methods and systems in four areas create the greatest barriers: accounting systems; specifications and standards; rights in technical data; and government-specific statutes that mandate fundamental changes in business practices.

Accounting Systems

One of the most expensive and disruptive requirements involves mandatory adherence to cost principles and accounting standards enumerated in statute, in the Federal Acquisition Regulation (FAR), and by the Cost Accounting Standards Board (CASB). Where the government contracts on a reimbursement or complex incentive basis, there is a bona fide need for a uniform, specialized accounting system which protects the government from the imposition of unreasonable charges. Indeed, this unique system of regulation arose precisely because Generally Accepted Accounting Principles (GAAP) have little to say about recording, reporting, and allocating costs actually incurred. Therein lies the problem: Companies that do not sell to the federal government keep their books in accordance with GAAP and, if required to meet government cost accounting requirements, would have to implement a completely separate accounting system at great expense.

Specifications and Standards

The specification and standard problem — overspecification and detail enforced by large numbers of auditors and inspectors — arises without clear delineation from statutes, regulations, good intentions, practice, and habit. The problem for a commercial company, as with government-unique accounting principles, is that compli-

²⁰Center for Strategic and International Studies, *Integrating Commercial and Military Technologies for National Strength* 15 (March 1991) [hereafter CSIS Study] 15. A 1990 workshop at DSMC on "Why Firms are Leaving the Defense Market" confirms the CSIS conclusions. Industry participants in the study identified 34 major reasons why firms had left or were planning to leave the defense market. Among these reasons were: criminalization of the procurement process; audit procedures inconsistent with those typically used by industry; inappropriate overlays of defense-unique requirements on commercial products; inappropriate application of regulations, specifications, and standards; excessive costs of doing business with DOD; technical data rights; proliferation of regulations; and unnecessary calls for cost or pricing data.

ance with government standards often requires a departure from commercial practices, not to mention the company's own processes which have led to commercially successful products. To the extent that DOD standards are out-of-date or out of touch with commercial practice, the cost of compliance increases.

Rights in Technical Data

Commercial vendors fiercely protect proprietary information. Under current statutes and regulations, DOD is allowed to obtain a substantial portion of the very technical know-how and proprietary data that is the lifeblood of modern enterprise. Vendors cannot be assured that their proprietary rights will be protected. Increasingly, commercial companies will not sell their best technologies to DOD because they simply will not put their proprietary data at risk.

Socioeconomic Legislation

A buyer in the commercial marketplace seldom if ever insists that a seller change its hiring, promotion, compensation, benefits, subcontracting, or transportation practices as a condition of making a sale. But the federal government does this as a matter of course in almost every contract it awards. The problem is not that any particular requirement is so onerous as to dissuade companies from dealing with the federal government; but when a combination of frequently changing requirements is levied on contractors — some inconsistent with others, most requiring audit and the generation of reports, and all inconsistent with commercial practice — the burden on commercial companies is great.

THE DOD ACQUISITION CHALLENGE IN A TIME OF BUILD-DOWN

Previous efforts to promote the government's use of commercial products suggest good intentions that have failed to bear fruit — primarily because none of those efforts have created a complete statutory and regulatory structure for buying commercial products. Instead, statutes, and regulations designed for buying govern-

ment-unique products — and perhaps unobjectionable for this purpose — have been allowed to remain as barriers. Now that the defense buildup of the 1980s has turned into the build-down of the 1990s, defense procurement policy must be reshaped to ensure the long-term goal of retaining an adequate defense technical and industrial base. Declining purchases of defense-unique products mean higher unit costs, declining profits, and lost jobs in many defense-specific industries. At the same time, the high cost of doing business with the government is causing companies to leave the defense market — or never to enter at all.

In this environment, continued reliance by DOD on defense-unique products can only mean higher costs and loss of industrial base for DOD. One of the principal solutions for this dilemma is to encourage DOD agencies to use commercial products to the maximum extent possible. This approach promises:

- Lower prices through greater competition;
- Lower prices through lower costs typically associated with high-volume commercial production;
- A broader industrial base, because the base is maintained not just by DOD, but by the national economy as a whole;
- Increased surge capacity, because DOD needs can be met by diverting supplies that would ordinarily go to the civilian market, rather than by building or rehabilitating defense plants to build defense-unique products;
- Greater access to cutting-edge technologies, which typically emerge in the commercial marketplace before they do in defense industries.

Moreover, even if DOD spending and the defense technical and industrial base were not declining, using more commercial items would still make sense for two reasons. First, commercial items tend to be much less expensive than

their defense-unique counterparts. Second, commercial items now tend to be more technically advanced than defense-unique products, primarily because the pace of introduction of new commercial items generally exceeds the fielding of new military products.

While cost comparisons are difficult, several recent studies have concluded that current procurement policies drive defense industry overhead far above that which is required in commercial companies. For example, the Office of Technology Assessment reports studies showing that the entire regulatory regime adds 10 to 50 percent to the cost of doing business with the government, an amount equal to tens of *billions* of dollars annually.²¹ The Center for Strategic and International Studies (CSIS) reported on a case study of a company which performed both military and civilian contracts, and concluded that the military division of the company had higher product costs because the number of administrative personnel in the military divi-

sion was eight times higher per dollar of sales, and twice as high as a percentage of total personnel, as the commercial division (see chart below).

CSIS also found that at Pratt & Whitney, 52 people were employed solely to accommodate government auditors' requests for reports, at a total cost to the government of \$13 million annually (for government and contractor personnel). Similarly, General Electric reported that it required two full-time employees to handle the administrative load created by each government representative assigned to its engine programs, for a total administrative cost of \$3 million per year.²²

A study conducted by the ADPA at the request of the Panel found that: "the Department of Defense pays a premium from 30 to 50% more for products than the same or similar items sold to a commercial enterprise. In some cases, the costs may be 100% higher."²³

Personnel in Military vs. Commercial Divisions	Number			Number Per Billion	
	Commercial	Military	Total	Commercial	Military
Annual Sales (\$ Billions)	\$10	\$4	\$14		
Administrative Personnel	3,842	9,979	13,821	384	2,495
Engineering	7,557	13,605	21,162	756	3,401
Manufacturing	25,548	18,306	43,854	2,555	4,577
Quality Control	2,835	2,583	5,418	284	646
Facilities	2,177	3,038	5,215	218	760
Logistics	1,696	1,399	3,095	170	350
Computing	1,211	5,425	6,636	121	1,356
Other	170	629	799	17	157
Total	45,036	54,964	100,000	4,505	13,742
Ratio of Admin. to Total Employment	9%	18%	14%		

²¹ U.S. Congress, Office of Technology Assessment, *Holding the Edge: Maintaining the Defense Technology Base* 9-10, 13-14, 172-177 (1989).

²² CSIS Study, 19-29, 24.

²³ George K. Krikorian, presentation to the Acquisition Law Advisory Panel, Ft. Belvoir, Va. (June 3, 1992). See also Mr. Krikorian's statement before the House Armed Services Committee Subcommittee on Investigations, July 22, 1992, and his article, *DOD's Cost Premium Thirty to Fifty Percent*, *National Defense* (Journal of the American Defense Preparedness Association) 12-13 (Sept. 1992).

The second reason for "buying commercial" is to gain access to modern technology. In many fields, DOD is no longer the primary technology driver in the U.S. economy. The ADPA and CSIS studies found, for example, that all of the industrial firms surveyed had established separate divisions to perform DOD work because the costs imposed by DOD regulations would otherwise have jeopardized their commercial business. As a result, research and development efforts were not performed in the same organization. Whenever research and development conducted by each division had "spin-offs" for the other, it was usually the commercial division that created new technologies which were then transferred to the military division.

While there are many reasons why DOD should buy commercial products and components, it is also evident to the Panel that there are many legitimate reasons why DOD cannot purchase commercial items to the same degree and in precisely the same way as commercial companies. Some of these include:²⁴

- Some items simply do not have commercial counterparts; e.g., nuclear submarines, fighter aircraft, and tanks.
- The DOD, like any large organization, must have some uniformity and consistency in the equipment it uses, to promote efficiency and to reduce training and fielding costs.
- The DOD's systems in some cases require greater performance or reliability in more adverse conditions than those typically available in the commercial market.
- The DOD may require a level of secrecy about its requirements and acquisition programs that is inconsistent with commercial buying practices.

Because of such factors, DOD must have flexibility to determine whether it is in the best interest

of national defense to buy commercial items in a specific instance. The Panel recommends that this flexibility be provided in regulations rather than attempting to define those specific circumstances by statute.

PANEL RECOMMENDATIONS

The commercial item statute proposed by the Panel consists of a new, core subchapter to be added to Chapter 137 of Title 10 of the U.S. Code, plus specific amendments to other existing sections of Title 10. The new and amended provisions are intended to work together as a single piece of legislation, although some portions, such as rights in technical data and "buy American" preferences, are implemented by amendments to existing chapters dealing with those topics.

Definition of Commercial Items: 10 U.S.C. § 2302

The Panel spent a great deal of time drafting a commercial item definition and conducted extensive reviews of its work in open sessions with spokespersons for many interested segments of the public, as well as representatives of various government agencies (both within and outside DOD). The definition adopted by the Panel, which is an addition to the general definitions in 10 U.S.C. § 2302, is as follows:

(5) The term "commercial item" means

(A) Property, other than real property, which: (i) is sold or licensed to the general public for other than government purposes; (ii) has not been sold or licensed to the general public, but is developed or is being developed primarily for use for other than government purposes; or (iii) is comprised of a combination of commercial items, or of services and commercial items, of the type customarily combined and sold in combination to the general public;

²⁴ See Chap. 8, pp. 14-15, of the Report for a more complete list.

(B) The term "commercial item" also includes services used to support items described in subparagraph (A), such as installation, maintenance, repair and training services, whether such services are procured with the commercial item or under a separate contract; provided such services are or will be offered contemporaneously to the general public under similar terms and conditions and the government and commercial services are or will be provided by the same work force, plant, or equipment;

(C) With respect to a specific solicitation, an item meeting the criteria set forth in subparagraphs (A) or (B), if unmodified, will be deemed to be a commercial item when modified for sale to the government if the modifications required to meet government requirements (i) are modifications of the type customarily provided in the commercial marketplace or (ii) would not significantly alter the inherent non-governmental function or purpose of the item in order to meet the requirements or specifications of the procuring agency;

(D) An item meeting the criteria set forth in subparagraphs (A), (B), or (C) need not be deemed other than "commercial" merely because sales of such item to the general public for other than governmental use are a small portion of total sales of that item; and

(E) An item may be considered to meet the criteria in subparagraph (A) even though it is produced in response to a government drawing or specification; provided, that the item is purchased from a company or business unit which ordinarily uses customer drawings or specifications to produce similar items for the general public using the same work force, plant, or equipment.

In crafting this commercial item definition, the Panel made a number of important choices:

Single Definition vs. Multiple Definitions

The Panel determined that ease of administration requires a single definition for commercial items to be used uniformly throughout DOD. From the outset, one of the Panel's objectives in defining a commercial item was to be able to exempt items so defined from the reach of those statutes and implementing regulations which have created barriers to the acquisition of commercial items.

Property vs. Services

After surveying the statutory barriers to broader use of commercial items, the Panel concluded that statutes primarily create barriers to the acquisition of *manufactured products*. In general, statutes create barriers because they disrupt established manufacturing methods, sources of supply, and personnel practices. For example, commercial companies generally try to establish long-term supplier and subcontractor relationships, and often have a supplier and subcontractor base in place well before the first unit of a commercial item is manufactured. As a result, the requirement that government contractors establish subcontracting plans cannot be implemented at all with respect to shipments from inventory and can be implemented only with great difficulty and disruption in order to fulfill a specific DOD contract. By contrast, these statutes do not create the same type of barriers to the acquisition of commercial services. With some exceptions, companies that sell commercial services to DOD appear to be able to comply with statutes governing service contractors, such as the Service Contract Act²⁵ and the Vietnam Era Veterans Readjustment Act,²⁶ with less disruption to existing practices. Moreover, smaller companies, which may have the greatest difficulty in complying with unique statutory requirements, should become largely exempt from such statutes under the Panel's proposed simplified acquisition threshold amendments.²⁷

²⁵41 U.S.C. §§ 351-358.

²⁶38 U.S.C. § 4212.

²⁷See the "simplified acquisition threshold" of this summary as well as Chap. 4 of the Report.

Ancillary Services

Although the Panel decided to cover primarily "property" within the commercial item definition, it agreed that some types of services ancillary to the acquisition of property also had to be included within the definition of a commercial item to avoid creating barriers to the acquisition of the commercial items themselves. Industry groups advised the Panel that commercial products are typically installed, maintained, and repaired by workers in commercial companies whose business practices will not comply with contract-specific statutory and regulatory restrictions. A similar argument was made for training services, which would use the same material, instructors, and classrooms regardless of whether a product is sold to the government or sold commercially. Again, the argument was that it made no sense — and indeed created a barrier to the acquisition of commercial items themselves — to require a commercial company to change its classrooms or its sources of repair parts, or to comply with the Service Contract Act, as a condition of accepting a government contract for the performance of what would otherwise be a service provided to the general public. The Panel accepted this argument, but imposed the additional requirement that to enjoy commercial item status, such ancillary services had to be offered contemporaneously to the general public under similar terms and conditions. This ensures that there must be some reasonable expectation that the service provided to DOD will also be provided to the general public. A gap of a few months might be reasonable, but a gap of several years between the date the service is offered to DOD and the date it is offered to the general public would not be.

Modified Products

Past practice has limited commercial acquisition to "off-the-shelf" items or "minor modifications" of off-the-shelf items. The Panel concluded that such a narrow policy on modifications does not recognize current commercial

reality. Today, a commercial buyer can often buy a modified commercial product from a commercial vendor if the cost of the modification is not great compared to the cost of the commercial item or to the value of the contract. Because DOD will often be a "large buyer" and will often have somewhat unique needs, DOD should have the same flexibility as a commercial company to obtain modifications that would be available to, for example, a Fortune 100 company.

New Products; Combinations of Products; Products Sold in Small Quantities to the General Public

The Panel extended the concept of "commercial item" to new products and to products not yet sold to the general public in order to ensure that the government is not foreclosed from buying "cutting edge" technology simply because it is an early, major buyer of that technology. The purpose of this provision is to encourage the acquisition of new technology from the commercial sector rather than "growing it in-house." Moreover, given the long lead times frequently faced in the government procurement cycle, it will often be essential to make purchases at the cutting edge of technology in order to ensure that an item is still current technology by the time it is fielded. In addition, the Panel expressly defined a system made out of a *combination* of commercial items as a commercial item so long as the combination was of the sort that would be made for a nongovernmental buyer. The purpose of this provision was to allow DOD to contract for systems, such as personal computer systems, which typically are sold commercially as systems even though products from various vendors may be assembled or integrated by yet another vendor before the sale takes place. The Panel's definition covers combinations of commercial items even if the precise system being ordered by DOD had not been assembled before and sold commercially. Finally, the Panel wanted to be clear that DOD is not to be precluded from buying an item as a commercial product simply because some arbitrary

percentage of sales has not been made to the general public.²⁸

Items Produced by "Dual-Use" Manufacturers

As the defense budget shrinks from its 1986 high, it is clear that DOD demand alone will be inadequate to sustain the current size and surge capacity of today's defense-unique industrial base.²⁹ Therefore, if there is to be an adequate industrial base, DOD must be able to draw on both defense-unique and commercial companies for the products it needs. As a first step toward integration, the Panel recommends a proposed section 10 U.S.C. § 2302(5)(E), which is intended to remove barriers to the use of commercial processes, such as the manufacture of paint or castings, which frequently are used to produce a product to the specifications of the buyer. The Panel felt that the same concern for removing barriers to commercial-military integration — which justified removing barriers to the acquisition of commercial items — also required regulatory and statutory relief to a supplier of commercial processes to nongovernmental buyers. Otherwise, a commercial manufacturer would frequently be required as a condition of accepting a government order to change its fundamental manner of doing business when the need is for greater development of flexible manufacturing in integrated facilities.

Existing Sources; Nondevelopmental Items

While the Panel's emphasis has been on promoting the use of commercial products both as end-

items and as components, it recognizes that widespread use of commercial items will create a transition problem for businesses that are today supplying the DOD-unique products that will be supplanted by commercial items. Accordingly, the Panel has provided that nondevelopmental items and existing sources of supply will ordinarily be permitted to compete for DOD's procurement dollars on an equal footing with commercial replacements. In addition, the Panel has specifically provided that current policy on set-asides for small, minority, and small disadvantaged businesses will not be disturbed by the new statute. As a result, small businesses which today supply many defense-unique articles for which there are commercial equivalents should continue to have a market for their products.³⁰

Policy; 10 U.S.C. § 2301

Since 1984, CICA has provided that it is the policy of Congress that DOD must "promote the use of commercial products whenever practicable." However, the Panel determined that the policy statement in CICA needed to be amended to reflect more accurately the policies needed to guide defense procurement in the post-Cold War era of fiscal restraint. This was accomplished in three ways. First, to promote commercial-military integration, section 2301 would be amended to emphasize that commercial items shall be used by DOD whenever practicable, both as end-items and as components. Second, to cut the costs of defense-unique procurement, when commercial items are not available or do not meet DOD's requirements, the Panel would

²⁸In recommending the adoption of 10 U.S.C. § 2302(4)(D), the Panel rejected the percentage of sales tests currently used for the catalog pricing exemption under TINA as tests relevant to commercial item acquisition policy.

²⁹See, e.g., *Report of the Structure of U.S. Defense Industrial Base Panel of the Comm. on Armed Services of the House of Representatives, Future of the Defense Industrial Base 1-2*, 16 (April 7, 1992).

³⁰See the "socioeconomic laws" section of this summary and Chap. 4 of the Report for its recommendations concerning small and small disadvantaged businesses. The intent of those recommendations is to shelter small businesses furnishing government-unique products from competitive pressure until they can move into commercial markets. The Panel also recognizes that, in the past, Congress has objected to regulatory changes that would replace existing small business sources with commercial companies. See, for example, the Defense Authorization Act for FYs 1990 and 1991, Pub. L. 101-189, and H. Conf. Rep. No. 101-331 101st Cong., 1st Sess. 613 (1989). The Panel's recommended approach will allow existing suppliers to compete against new suppliers of commercial items.

require DOD to use suitable nondevelopmental items prior to developing unique defense goods. Finally, the Panel would amend section 2301(b)(5) to prohibit regulations which needlessly interfere with the acquisition of commercial and nondevelopmental items.

Procurement Planning; 10 U.S.C. § 2325

Section 2325 in Title 10 requires DOD to develop its acquisition requirements to ensure the maximum use of commercial and nondevelopmental items.³¹ Since commercial and nondevelopmental items are required to be used only "to the maximum extent practicable," it is obviously essential that DOD's requirements not be drawn in such a way that only defense-unique products can meet them. The Panel has therefore suggested amendments to section 2325 which would require DOD to:

- Define its requirements so that commercial and other nondevelopmental items may be procured to fulfill those requirements; and
- Prior to acquiring a defense-unique item, to perform market research to determine whether commercial or nondevelopmental items, or modified commercial or nondevelopmental items, can be used in place of a defense-unique item.

Regulations

A proposed new subchapter of Title 10 implements the general guidance of section 2301 with directions to the Secretary of Defense to issue regulations governing the procurement of three types of items: commercial end-items; commercial components; and nondevelopmental items.

With respect to end-items, the Panel's recommendation mandates that DOD acquire commercial end-items "whenever commercial items will satisfy the needs of DOD." The Panel in-

tends by this that commercial items should become the norm, not the exception for end-items other than those unique to DOD's war-fighting role. This will require agencies to perform market research, to look diligently for commercial items in the early stages of the procurement process, and to use commercial items, including modified commercial items, when these will meet the minimum needs of the agency. In determining the needs of DOD, the Panel intends that DOD have latitude to select a defense-unique acquisition plan when required by, for example, industrial base or security concerns. However, the authority to reject commercial items on public interest or national defense grounds should be exercised very sparingly and at a level above that of the contracting officer.

The Secretary of Defense is required to draft uniform terms and conditions for various types of procurements and to establish an administrative structure under which standard terms and conditions could be varied if authorized by appropriate authority. The Panel recommends this structure for two reasons.

First, DOD must have some means to control the actions of far-flung contracting activities. The only practical way to achieve this control is for DOD to mandate standard terms and conditions that are to be used in the ordinary course of business.

Second, DOD must have the flexibility at an appropriate level of authority to modify or waive standard terms and conditions if the need for, or value of, a commercial item outweighs the benefit of trading on the standard DOD form. The principal problem DOD faces today in buying commercial items and in attracting commercial companies as sellers is DOD's inability to waive terms and conditions imposed by statute, executive order, or regulation. The Panel recommends exempting commercial item acquisitions from many of the statutes that today impede the

³¹ Nondevelopmental items are defined in 10 U.S.C. § 2325(d) to include "any item of supply that is available in the commercial marketplace." See Chap. 1.2 of the Report.

acquisition of commercial items. This does not mean, however, as some industry comments have suggested, that DOD must never ask for a term or condition that falls outside current commercial custom. Today, however, DOD is in the unhappy position of asking for any number of unique terms and conditions that are extremely expensive for commercial sellers to implement, while at the same time being constrained by statutory requirements from offering sustained purchases of an item from one particular source. This is a "lose-lose situation" for commercial sellers. Nonetheless, it was apparent from industry comments that some commercial sellers would be prepared to accept some government-specific terms and conditions on some orders, and that the willingness (or ability) of sellers to comply with government-specific terms and conditions will differ by industry, by company, and by the size of the order. Accordingly, the Panel found no reason to prohibit DOD absolutely from negotiating for unique terms and conditions if an appropriate level of contracting authority thought this should be done.

With respect to components, the Secretary is given authority to regulate the flow down of government-unique clauses to vendors of commercial components. How this should be done will depend heavily on the nature of the end-items being procured, and has been left to the Secretary to determine. Nonetheless, the Panel stated its preference that manufacturers of commercial components should be as free as possible from government regulation inconsistent with commercial practices, while recognizing that prime contractors supplying government-unique items will have good reason to want to flow down some government-unique clauses to subcontractors. For example, if the prime contractor must accept a government-unique warranty, the prime contractor will doubtless want equivalent warranty protection from its suppliers regardless of whether they supply defense-unique or commercial parts. Accordingly, the Panel did not foreclose some regulation of commercial component manufacturers. On the other hand, sources of government-unique products should not be allowed to pass down willy-nilly all contract clauses they must accept.

Precedence; Exemptions

The proposed new commercial items subchapter exempts procurements of commercial items from those statutes which appeared to the Panel, after reviewing recent industrial base literature and holding lengthy discussions with industry and government representatives, to create barriers to the use of commercial items. In addition, it establishes a rule of construction intended to prevent inadvertent repeal and defines the relationship of commercial item acquisition to simplified acquisition procedures and set-asides.

Many comments made to the Panel suggested that the best method for facilitating the acquisition of commercial items was to exempt commercial acquisitions from all laws, other than laws requiring full and open competition, that are not generally applicable to U.S. companies. While the Panel used this concept as one guide to identify statutory barriers to the use of commercial items, it did not believe it was necessary or appropriate for DOD to give up all contract-unique socioeconomic, ethics, and regulatory policies as a condition of obtaining commercial items. Accordingly, the Panel used as additional criteria for exemptions such considerations as (i) whether compliance with a statute was practical if a commercial item was purchased out of inventory; (ii) whether compliance would disrupt sources of supply, personnel practices, and business methods that would typically be in place in a company which served primarily the commercial market; and (iii) whether compliance with a contract-unique requirement would impose substantial expense on a "typical" commercial company.

In fashioning exemptions, as discussed above, the Panel is not recommending the abandonment of policies underlying laws to which exemptions have been applied. However, the Panel believes that many of the policies today imposed on contractors in a government-unique manner are also implemented in substantially the same way in statutes of general applicability. In many cases, these policies should not be implemented contractually because the costs of

government-specific contractual implementation outweigh the benefits. Alternatively, there may be ways to tailor the implementation of policies to avoid substantial impacts on commercial operations.

The Panel took three different approaches to the implementation of exemptions. First, the Panel drafted a new commercial items subchapter for Title 10, which contains provisions which replace or supplement existing law. Second, the Panel drafted exempting language in the body of a statute itself. Third, the Panel listed the remaining exemptions in the proposed new subchapter. Table II in the appendix summarizes the reasons for each such listed exemption. Table III in the appendix identifies those statutes for which exemptions or amendments would be required if other recommendations of the Panel are not adopted.

Pricing of Commercial Item Contracts; Audit; Remedies

The Panel was told repeatedly that companies which primarily sell to the commercial marketplace do not have accounting systems that will permit them to supply cost or pricing data as required by TINA. Because of the high cost of implementing a government-specific accounting system, commercial companies will often forego doing business with DOD rather than implement a cost accounting system that would permit them to comply with TINA. Thus, if DOD is to be able to acquire commercial items for which there is not adequate price competition as that concept is currently defined in TINA and implementing regulations—such as a modified commercial item or cutting-edge technology protected from direct competition by patent, copyright, or trade secret—appropriate relief from TINA had to be found.

The required relief is given in two ways. First, the Panel recommends amendments to TINA itself that (1) expand and clarify the exemption for adequate price competition when applied to items (and services) purchased from a business unit which produces the same or similar items

for the commercial market using the same or similar production processes and (2) exempts contract modifications to contracts awarded under the expanded definition of adequate price competition or under catalog or market pricing. Second, the Panel recommends a section on pricing in its proposed new subchapter of Title 10. By far the largest portion of commercial items acquisitions will be able to be conducted through competition as defined in 10 U.S.C. §§ 2302 and 2304 and in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. § 403(6)) or on the basis of established catalog or market prices as defined in the FAR (FAR 15.804-3(c)). In these cases, the proposed subsection provides that the contracting officer may presume that the price in the most advantageous offer, or a price based on established catalog or market prices, is fair and reasonable absent information to the contrary. The proposed section does, however, require the contracting officer to perform some "due diligence" prior to award when the price is based on catalog or market prices. Where competition or established catalog or market prices are not available, the Panel mandates that the contracting officer use price analysis to determine the reasonableness of a price and provides that the contracting officer may request "documentation" from offerors to assist in such analysis. If, however, the reasonableness of a proposed price cannot be established through price analysis, the provisions of TINA again apply to the acquisition. The Panel emphasizes that under the combined authorities of its proposed section and TINA, a contract will not be awarded unless the government can establish the reasonableness of the contract price by some means.

The Panel has intentionally referred to the information to be supplied by an offeror in support of price analysis as "documentation" and not "data" to emphasize that its proposal does *not* authorize the contracting officer to ask for cost or pricing data as defined in TINA and its implementing regulations. What is intended is that the contracting officer can ask for information that an offeror may have on hand as part of its ordinary commercial operations. After discussions with industry, the Panel concluded that

most vendors of commercial items can provide some form of documentation that would materially assist a contracting officer in determining that a price is reasonable using price analysis. On the other hand, it is frequently difficult, particularly in a large or far-flung organization, for an offeror to have sufficient information to be able to certify that documentation is representative of all sales by the offeror or that the price offered is the lowest offered to any commercial customer for sales on similar terms and conditions. The Panel has expressly refrained from requiring any representation that documentation furnished is complete or that a price offered to the government is the lowest offered to any other customer. If, however, an offeror is unwilling or unable to provide a sufficient basis for a determination of price reasonableness, and the contracting officer cannot find other information supporting a conclusion that price is reasonable, then TINA applies.

For the sake of parallel treatment to TINA, the Panel recommends a new subsection that creates a contract remedy applicable when an offeror "knowingly or negligently" provides inaccurate documentation. This remedy is not intended to replace existing contract fraud remedies or criminal penalties for false claims and false statements.³² Instead, it is provided because the government should have no less a remedy than a private buyer when a contract price is based on fraud or negligent misrepresentation and in recognition of the fact that circumstances may make a contractual remedy more appropriate and useful than the full panoply of sanctions for fraud.³³

Finally, to make effective the government's right to receive a price reduction for inaccurate documentation, the Panel has provided for access to the offeror's books and records in those situations in which documentation has been provided. This subsection is intended to replace all other existing audit rights (including those in 10 U.S.C. §§ 2306a and 2313). The Panel received testimony from industry that vendors of commercial items will not ordinarily retain, for their own purposes or for any great length of time, the sort of documentation to be supplied under proposed subsection 2xx5(b). Indeed, industry argued that any audit right should terminate with award of a contract. On the other hand, the Defense Contract Audit Agency (DCAA) and GAO both commented that it would not be practical to audit a reasonable number of commercial item contracts if the audit right expired with award. The GAO suggested that audit should be available up to three years after award or one year after final payment. The Panel believes that one year after award is a reasonable compromise between the needs of DOD and current industry practice, especially since the number of commercial item contracts awarded annually under subsection 2xx5(a)(2) should be small. Moreover, in many commercial items contracts, the period for audit permitted by subsection 2xx5(d) may not be very different from GAO's suggestion of one year after final payment. Absent a compelling demonstration by DCAA or GAO that audit resources cannot be made available within a year after award, the period available for audit should not be extended.³⁴

³² E.g., 18 U.S.C. §§ 287 and 1001 and the Civil False Claims Act, 32 U.S.C. § 3279.

³³ GAO commented that the Panel should extend the right to renegotiate contract price to circumstances in which documentation is inaccurate through no fault of the offeror. The Panel rejected this suggestion as (a) inconsistent with private commercial law and (b) inconsistent with the thrust of the Panel's purpose of fostering civil-military integration by facilitating transactions based on existing commercial practices in which price-related data is not collected for the purpose of certifying accuracy to the government. The massive criminal sanctions applicable to offerors should ensure reasonable care in making documentation submissions, and GAO has pointed to no documented need for strict civil liability to ensure that pricing is fair and reasonable.

³⁴ See, Chap. 8, p. 46 of the Report.

III

SIMPLIFIED ACQUISITION THRESHOLD AND SOCIOECONOMIC LAWS

There is an inverse relationship in DOD contracting between the dollars expended and the numbers of contract actions, with over 50 percent of those actions above \$25,000 involving contracts of less than \$100,000. Although these actions account for less than five percent of DOD expenditures, they require an inordinate amount of time to award and administer, largely because of numerous contract provisions required by statute and implementing regulations.³⁵ This problem has persisted despite long-standing efforts by Congress and DOD to simplify acquisition procedures for small-dollar contracts in order to reduce administrative costs and to speed procurement. Consequently, there is probably no single area of acquisition law where there is a greater potential to reduce costs, while retaining the management controls needed for the accountability of public funds, than in small-dollar DOD contracts.

SIMPLIFIED ACQUISITION THRESHOLD

Congress established a "small purchase threshold" at \$1,000 with the passage of the Armed Services Procurement Act of 1947. Since then, Congress has usually recognized the need to balance the benefits of new legislation with the potential for adverse impacts upon the efficiency of the procurement process. Periodic increases in the level of the small purchase threshold have been used by Congress to keep that level consistent with the effects of inflation. Other laws have also been deliberately drafted to minimize their

impact upon small-dollar value purchases usually by setting a "floor" below which the requirements of the new law would not apply. However, while the "ceiling" for simplified acquisitions was regularly adjusted to account for the declining purchasing power of the dollar, the floors for applying these other statutory requirements did not keep pace. As a result — and contrary to the original intent of Congress — the requirements of these statutes were gradually applied to formerly simplified acquisitions. Procedures originally intended to expedite the economic acquisition of small-dollar value items and services are now subject to a wide array of relatively complex and costly administrative steps, solicitation provisions, and contract clauses. Compliance with each of those provisions adds to the administrative overhead of both the government and its suppliers, while also adding barriers to commercial-military integration.

The Panel believes that the best way to streamline smaller purchases is to create a new, uniform "simplified acquisition threshold" at a level of \$100,000 (adjusted every fifth year for inflation) to replace the current small purchase threshold of \$25,000. To ensure that small business is not adversely affected by this increase, the Panel recommends extending the current small business reservation established by 15 U.S.C. § 644(j) up to the simplified acquisition threshold. By substituting a uniform threshold for the applicability of all socioeconomic provisions in place of

³⁵ See Table IV at the Appendix and Chap. 4.1 of the Report. When contracts under \$25,000 are added to this total, more than 98 percent of all DOD contracts are less than \$100,000.

the many differing thresholds which prevail today, contracting officers will not have to turn to a labyrinth of regulations to determine whether (and which) simplified procedures can be used. In addition, as DOD budgets decline, contracting offices will be able to conserve on contract administration resources and devote greater effort to contracts over \$100,000, which account for more than 90 percent of DOD's acquisition funds. Finally, small businesses which receive contracts below \$100,000 will not have to cope with unique and costly legislated contract requirements.

In recommending a simplified acquisition threshold of \$100,000, the Panel is not suggesting that all purchases of supplies or services below that threshold would be treated the same. Rather, the Panel is recommending a level below which the FAR and the DFARS would prescribe a range of simplified procedures that would vary by dollar value in terms of such factors as the amount (and documentation) of competition required, the formality and detail of price reasonableness documentation, and the contracting form to be used. Part 13 of FAR and DFARS provide a range of such procedures appropriate to the wide variety of simplified acquisitions, ranging from small imprest fund or credit card purchases to those requiring wider competition and more structured processes.

The Panel's recommendation consists of four parts.

I. Establish a Simplified Acquisition Threshold at \$100,000.

The small purchase threshold was elevated to its present level of \$25,000 in 1986. Small purchases were intended to be simplified by this threshold; i.e., not burdened with costly requirements unrelated to the value of the items or services being purchased. The Panel recommends that the threshold for simplified acquisition be increased to \$100,000. While any level is somewhat arbitrary, the Panel strongly believes \$100,000 is justified for several reasons.

First, the Panel reviewed available procurement statistics, which show that across a number of statutory programs, a \$100,000 threshold will simplify over 50 percent of contract actions above \$25,000 while affecting less than 5 percent of DOD expenditures above that amount. A \$100,000 threshold will mean that some 98 percent of all DOD contract actions can be accomplished under simplified procedures. Thresholds above \$100,000 begin to impact more significantly on the amount of spending that would be released from complex regulation, although an argument could certainly be made — and has been made by the executive branch in some cases — for a higher threshold. On the other hand, stopping at a threshold of \$50,000 would only free about half as many contract actions from complex regulations as the \$100,000 threshold.

Second, Congress set \$100,000 as the floor for the application of several recent statutes on procurement integrity and lobbying. While these laws impose restrictions on all contractors, they do not require contractual coverage below \$100,000.³⁶

Third, statements received by the Panel from several DOD agencies suggested that, as contract staffs are cut back as part of the overall defense "build-down," it will be difficult for contracting officers to spend much time on contracts below \$100,000.

Fourth, it seemed unlikely to the Panel that any company would actually be willing to spend the money to make fundamental changes in the way it does business in return for a sale of \$100,000 or less. This may be particularly true of small businesses, which are the preferred recipients of contracts of this size. Indeed, the Panel members are all familiar with anecdotal evidence showing that many small businesses never gain actual knowledge of, understand, or implement the "boilerplate" that is today inserted into smaller contracts.

³⁶ See 10 U.S.C. § 2397c(a)(1), 41 U.S.C. § 423(e)(7), and the Byrd Amendment, 31 U.S.C. § 1352 note.

Fifth, it appears that the great majority of contracts above \$25,000 and below \$100,000 are awarded on the basis of competition, which makes such contracts good candidates for simplification, since competition will be the norm.

Sixth, a \$100,000 threshold was authorized for Operations Desert Shield and Desert Storm for overseas purchases, a step which proved essential to the rapid mobilization of U.S. and allied forces.

Finally, the Panel approached its review with the presumption that each socioeconomic program created by Congress is important and should be implemented to the greatest extent consistent with reasonably efficient procurement procedures. At the same time, the Panel was mindful that its enabling legislation directed it to consider how procurement could be streamlined. The Panel believes that adoption of the \$100,000 threshold continues the government's commitment to socioeconomic (and other regulatory) programs, reduces the barriers to small and small disadvantaged business participation in government contracting, and streamlines the defense acquisition system. The Panel understands that the major objection to using the \$100,000 threshold for domestic purchases has been the perceived impact of such a threshold on small and minority businesses. As set out more fully in the next section of this summary, (and Chapter 4.3 of the Report) the Panel has recommended statutory changes to protect the interests of small and minority businesses in receiving smaller contracts on a priority or set-aside basis. This, the Panel hopes, will remove the principal objection to use of the \$100,000 threshold for domestic acquisition.

II. Adjust Existing Statutory Floors to Not Less Than \$100,000.

The Panel identified some 30 laws requiring clauses in contracts at various values below \$100,000. These statutes and their respective contract clauses are set out in Tables V and VI of the appendix. The Panel makes two different recommendations with respect to such laws.

One group of laws should continue to apply to simplified purchases, but should not require implementation in contracts. Examples of this type of law are prohibitions against gratuities or the hiring of certain debarred individuals. This set of laws, like criminal law, is binding whether or not clauses appear in a contract. The reason for removing the clauses is to permit smaller transactions to be handled by credit card, electronic data interchange, or other simplified means where there may be no "contract" in the classic sense of a paper document within which to place the clauses. Indeed, one of the greatest barriers to the implementation of credit card purchasing for smaller DOD contracts is the need to have a paper contract which contains clauses mandated by, for example, the Walsh-Healey Act or Exec. Order No. 11246.

A second group of laws is not self-executing, but applies only if implemented by contract clause. Examples are the Service Contract Act and the Davis-Bacon Act. As to these laws, the Panel recommends that the statutory floor below which the law does not apply be set at the simplified acquisition threshold (i.e., \$100,000 as adjusted for inflation). The reason for increasing these thresholds is to reduce the amount of paperwork required to award the contract and monitor its performance, to speed the award of smaller contracts, and to reduce costs of performance by the private sector — which will hopefully lead to reductions in the price of smaller contracts. In this regard, the DOD Directorate for Contract Policy and Administration advised the Panel that the lead time for procurements above the current small purchase threshold averages four to six months, while the lead time below the threshold averages one month. In addition, a number of DOD agencies advised the Panel that cutbacks in defense manpower will, as a practical matter, make monitoring smaller contracts very difficult. The threshold recommended here will simplify more than 50 percent of contract actions over \$25,000 but impact only a very small percentage of total DOD spending. The \$100,000 threshold will conserve contract administration resources, allow agencies to focus management

efforts on high-value contracts, and limit any impact on socioeconomic programs.³⁷

III. Reserve Purchases under the Simplified Acquisition Threshold for Small Business.

At present, all purchases below the small purchase threshold are reserved by statute (15 U.S.C. § 644(j)) for small business so long as there is a reasonable expectation that at least two small businesses will compete and can be competitive on price and quality. By regulation, contracts above the small purchase threshold can be set aside (totally or partially) for small business or small disadvantaged businesses, again so long as there is a reasonable expectation that two or more responsible offerors will bid for the work and reasonable price and quality will result. The Panel was advised by the DOD Office of Small and Disadvantaged Business Utilization that thousands of DOD contracts between \$25,000 and \$100,000, totaling in the hundreds of millions of dollars, are today set aside by regulation for small business or small disadvantaged business. The Panel believes it is appropriate to continue existing practice as the simplified acquisition threshold is raised to \$100,000, and therefore recommends raising the statutory small business reservation in 15 U.S.C. § 644(j) to \$100,000 as well.

In recommending that the small business reservation be raised, the Panel is aware that today many DOD contracts between \$25,000 and \$100,000 are awarded pursuant to section 8(a) of the Small Business Act (15 U.S.C. § 637(a)) or under the predecessors to 10 U.S.C. § 2323 (and related Public Laws).³⁸ It has therefore drafted amendments to 15 U.S.C. § 644(j) that permit set-asides of DOD contracts below \$100,000 to minority and small disadvantaged businesses to continue. The Panel stresses that the purpose of

this amendment is to ensure that the enlarged small business reservation does not interfere with current practice. In addition, it is not the Panel's intention to "exempt" awards under the 8(a) program or section 2323 from the simplified procedures authorized for contracts below \$100,000; to the contrary, the Panel believes that simplified procedures should be used to the maximum extent practical for all contracts under \$100,000 including those awarded under set-asides.

Finally, the Panel notes that section 801 of the National Defense Authorization Act for FY 1993 has added a requirement³⁹ that the Secretary of Defense "provide guidance to Department of Defense Personnel on the relationship among" the set-aside programs created under section 8(a) of the Small Business Act, section 15 of the Small Business Act (15 U.S.C. § 644), and section 2323 of Title 10. The Panel recommends that allocation of DOD contracts below the simplified acquisition threshold be made pursuant to such regulations and not by statute in order to permit the Secretary to meet the various socioeconomic participation goals levied on DOD.

IV. Simplify and Modernize Contract Notice Procedures.

In order to ensure broader public access to streamlined procurement opportunities, the Panel recommends increased use of electronic procurement notice and contracting methods. Current notice requirements are set by section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. § 416). This provision requires DOD contracting offices to post public notices of any solicitation expected to exceed \$5,000 (\$10,000 for civilian agencies) and to advertise procurements above the small purchase threshold in the *Commerce Business Daily* (CBD).

³⁷ For a fuller examination of the \$100,000 floor, see the separate statutory discussion for each statute listed in Table VI.

³⁸ Formerly the "section 1207 program." See Pub. L. No. 102-484, § 801, 106 Stat. 2315, 2442 (Oct. 23, 1992).

³⁹ 10 U.S.C. § 2323(e)(5)(C), added by Pub. L. No. 102-484, § 801(C)(5), 106 Stat. 2443 (1992).

The Panel recommends the following amendments:⁴⁰

- Raise the threshold for synopsis in the CBD to the simplified acquisition threshold. This change alone should substantially decrease procurement lead times for smaller purchases.
- Require all solicitations above \$10,000 to be posted locally, preferably through the use of electronic bulletin boards, 800-numbers or other methods of electronic advertising. When the synopsis threshold is raised to \$100,000, it is critical to small business that an effective, low-cost, and efficient replacement be found. Physical posting of a paper notice at a local contracting office does not fill this bill.
- Require the Administrator for Federal Procurement Policy (by amending section 416 to add a new subsection (e)) to develop uniform regulations to establish widespread notification of opportunities below the simplified acquisition threshold. There are today a number of efforts within DOD to aggressively promote the use of electronic notice and contracting methods. Given the speed with which electronic technologies change, it would be inappropriate to legislate the form such notice must take. Instead, the Administrator should be charged with phasing in electronic methods as the required technology becomes reasonably available to government and the business community in general and small business in particular.⁴¹

SOCIOECONOMIC LAWS

One of the mandates in the Panel's charter was to recommend the elimination of those statutes unnecessary to the buyer-seller relationship. Under this criterion, few, if any, of the socioeco-

nomic statutes would be retained. However, the proliferation of socioeconomic statutes applicable to DOD — 114 such statutes (either separate sections of the U.S. Code or specific sections of various public laws) were reviewed by the Panel — shows that the defense acquisition system reflects a balance between the requirements of efficiency or streamlining and the dictates of larger national goals. In short, the requirements of the common defense have always been balanced by the necessity to promote the general welfare. Each defense dollar is expected to perform double duty: not only satisfying the primary purpose for which it was authorized but contributing as well to the objectives of full, fair, and equal employment opportunity, proper utilization of the defense industrial base, promotion of small business and minority business, and protection of the environment.⁴²

A Consolidated Socioeconomic Chapter in Title 10

Existing socioeconomic laws are a diverse mixture of unrelated enactments, with many of the laws affecting DOD not even being codified. The Panel recommends that Congress consider the adoption of a new chapter of Title 10 which would consolidate existing socioeconomic policy — especially the small and minority business legislation that is today scattered in authorization and appropriation acts — and would create a structure for future laws. The Panel believes that a comprehensive new chapter should do the following:

Enumerate the laws applicable to DOD. — The public laws reviewed by the Panel suggest a pattern in which annual defense authorization or appropriations acts regularly become the preferred vehicles for the imposition of new socioeconomic requirements on DOD. These new

⁴⁰ See Chap. 1.2 of the Report for a full discussion of 41 U.S.C. § 416.

⁴¹ It is the Panel's hope that the Administrator would encourage contracting offices to move to electronic notice and contracting by reducing procurement lead times for solicitations that are posted electronically.

⁴² See, Chapters 4.1 - 4.4 of the Report

and often complex statutory requirements in uncodified law make it very difficult to determine which laws are no longer necessary, which conflict with others, and which in combination have impacts that no one anticipated or desired. Old laws are seldom repealed, spawning an even greater number of regulations.

Streamline requirements. — The 114 socioeconomic statutes which were reviewed for their impact upon defense procurement represent a potpourri of requirements imposed upon the DOD from multiple sources with varying degrees of relevance, validity, and importance to the national interest or the national defense. While each socioeconomic law may have been passed with the best of intentions and the purest of motives, their cumulative effect has been to add both costs and significant barriers to commercial-military integration outlined above. Consolidation into a new section of the U.S. Code would encourage the drafting of legislation based on a comprehensive view of the acquisition system.

Balance the Desire to Legislate Against the Practicalities of a Decreasing DOD Work Force.

— A recent study by the Merit Systems Protection Board documented the fact that the government's 31,000 contracting officers are hard-pressed even today to administer a procurement system characterized by a "potentially counterproductive growth in federal procurement policy and procedures."⁴³ With fewer contract administrators and auditors available in the future, DOD clearly needs to be able to focus the efforts of these specialists on contracts which carry the greatest number of dollars — and a concomitantly higher degree of risk to the government — and where social programs will have the greatest impact.

Reduce Contractual Implementation of Laws.

— In the past, many socioeconomic statutes

have been implemented by contract clauses, with the result that most violations of statute are also breaches of contract. The Panel recommends that any comprehensive review of socioeconomic policy give serious consideration to replacing the doctrine of "enforcement through contract clauses" with a mechanism, such as suspension and debarment, which gives the government the power needed to obtain compliance through direct enforcement. More straightforward enforcement methods would avoid the enormous clutter found in contemporary government contracts, ease the burden on a shrinking contracting work force, and reduce barriers to commercial-military integration.

Labor and Equal Opportunity

In its review of the labor statutes pertaining to defense procurement, the Panel concentrated on those statutes which, because of their unique requirements, place an unusual burden upon the defense procurement system. Only three labor laws appeared to create such burdens: the Davis-Bacon, Service Contract, and Walsh-Healey Acts. Although these are "prevailing wage" statutes that do not single out DOD, *per se*, they apply to a wide range of defense contracts involving, respectively, construction, services, and manufactured goods. Although Davis-Bacon and Walsh-Healey were passed during the Great Depression, they have become legislative landmarks, surviving periodic attempts at repeal or reform. The General Accounting Office (GAO) has, in successive reports, urged the repeal of both the Davis-Bacon and Service Contract Act, arguing that they are hard to administer and that they inflate the costs of government contracts.⁴⁴

The Panel's principal recommendations on the Davis-Bacon and Service Contract Acts were formulated with the overriding objective of el-

⁴³ U.S. Merit Systems Protection Board, *Work Force Quality and Federal Procurement: An Assessment*, Washington, D.C., July 1992, p. iii.

⁴⁴ See, respectively, U.S. General Accounting Office, *The Davis-Bacon Act Should Be Repealed*, GAO/HRD 79-18, April 27, 1979; and *The Congress Should Consider Repeal of the Service Contract Act*, GAO/HRD 83-4, Jan 31, 1983. See also Chap. 4.2 of the Report.

evaluating their thresholds to a common level of \$100,000, consistent with the simplified acquisition threshold discussed above. The application of this threshold to the labor laws would provide a common floor of \$100,000 in place of the wide variations that currently prevail — \$2,000 for Davis-Bacon and \$2,500 for the Service Contract Act, for example. For Davis-Bacon, the elevated threshold would streamline 52.5 percent of DOD contract actions above \$25,000 while affecting only 7.0 percent of the dollars; for the Service Contract Act, 57.3 percent of the actions would be streamlined while only 7.8 percent of the contract dollars would be affected.⁴⁵ In taking this position, the Panel specifically rejected the advice of those who urged either higher threshold levels or the outright repeal of both these laws. However, the Panel accepted the recommendations of many people who urged the repeal of the Walsh-Healey Act. This statute is one that has gradually outlived whatever usefulness it may once have had, its major provisions having been whittled away by the passage of more progressive legislation over the years.⁴⁶

The general need to consolidate a number of labor-related requirements at the \$100,000 level also led to the Panel's recommendations concerning the Miller Act (40 U.S.C. § 270a, *et seq.*). This law protects the government against non-performance and related liabilities by imposing a bond requirement on prime contractors performing federal construction projects exceeding \$25,000. To provide greater uniformity in contract administration, the Panel proposes amending the Miller Act to adjust this threshold to \$100,000. In presenting this recommendation, however, the Panel carefully considered a number of comments which strongly suggested that it was in the best interests of the government to

retain the present threshold. While the Panel has no doubt concerning the recommended level of the Miller Act threshold, it suggests that Congress may well wish to approach that goal through the intermediate step of either a test program or a study designed to monitor the application of the streamlined acquisition procedures recommended here.

Small and Disadvantaged Business

One of the most important areas examined by the Panel concerned the relationship between the defense procurement system and those laws which Congress enacted to promote the interests of small business, especially those businesses which are both small and disadvantaged. The Small Business Act clearly has a major effect on DOD acquisition policy, an effect which has been magnified by a succession of defense authorization and appropriations acts mandating specific actions by DOD to support various small business programs. In assessing the impact of these requirements, however, the Panel was mindful that another congressionally-chartered body, the U.S. Commission on Minority Business Development, had been formed in 1989 with the broader mandate of examining the operations and policies of the Small Business Administration, as well as assessing the general state of the minority small business community nationwide. The Commission's final report, issued in September 1992, will clearly have a major influence upon future discussions of minority business issues.⁴⁷ Despite the differences in charters — as well as the time and resources devoted to their respective studies — this Panel made a number of important recommendations which support the Commission's objectives:

⁴⁵ Source: OSD, Directorate for Information Operations and Reports, *DOD Prime Contract Awards, Size Distribution, FY 1991*, p. 16.

⁴⁶ It should be emphasized that those provisions of Walsh-Healey which grant expanded procurement opportunities for the blind and severely handicapped (41 U.S.C. §§ 46-48c, also known as the Javits-Wagner-O'Day Act) would be preserved under the Panel's recommended changes.

⁴⁷ U.S. Commission on Minority Business Development, *Final Report*, (Washington, D.C: USGPO, September 1992). See also Chap. 4.3 of the Report.

- Congress should replace existing small business legislation — much of which is contained in frequently-changed uncodified law and some of which is internally inconsistent — with a comprehensive and consistent small business code.
- In such a new code, Congress should go beyond the allocation of procurement dollars and make provision for access by small business to capital, training, and management support.
- The Secretary of Defense should consider appointing a DOD advisory committee on small business to provide continuing advice on the management of DOD small business programs.
- Congress should amend 15 U.S.C. § 637 to permit direct contracts between federal agencies and small businesses selected for award under the Small Business Administration's "section 8(a)" program.
- Congress should repeal § 804 of the DOD Authorization Act for FY 1993 or extend its procedures governing certificates of competency to all federal agencies.

IV

CONTRACT MANAGEMENT

The Panel's Report contains extensive analyses of two areas which are fundamental to the acquisition process: contract formation (issues generally arising before the award of a DOD contract) and contract administration (those activities necessary to ensure that both the government and its suppliers fulfill their obligations under the contract). A closely-related area involves the methods and forums for the resolution of protests which may arise in the course of a procurement. All three of these areas are central to the DOD contracting process and, for that reason, are summarized here under the title contract management.

As an overview, the Panel found that the majority of these laws were necessary for the buyer-seller relationship. In line with its charter, however, the Panel recommended numerous amendments, consolidations, and repeals to improve and strengthen the contract management process, while fulfilling the goals of streamlining and simplification.

CONTRACT FORMATION

Chapter 1 of the Panel's Report sets forth its analyses and recommendations on the statutes pertaining to contract formation, including those on procurement protests. The Panel's review of these statutes began with those in which Congress set forth fundamental policies governing the operation of the procurement system and

procedures for government agencies. Those policies are derived from the fundamental concept of competition, an idea that has been embedded in government contract law since the earliest days of the Republic. In 1809, for example, Congress enacted a law to provide that "all purchases and contracts for supplies and services shall be made by open purchase or by previously advertising for proposals."⁴⁸ More recently, in response to concerns that competition had become the exception and not the rule in government contracts, Congress established full and open competition as the guiding principle for all government acquisitions. The Conference Report on the Competition in Contracting Act (CICA) of 1984 explained this principle as follows:

The conference substitute uses "full and open competition" as the required standard for awarding contracts in order to emphasize that all responsible sources are permitted to submit bids and proposals for a proposed procurement. The conferees strongly believe that the procurement process should be open to all capable contractors who want to do business with the Government.⁴⁹

The full and open competition policy underlies all of the Panel's recommendations on contract formation. The Panel believes that its recommendations will improve and strengthen the

⁴⁸ 2 Stat. 536.

⁴⁹ H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1442 (1984).

competition process and enable DOD to gain a fuller measure of the benefits of competition, including competition for commercial and nondevelopmental items.

Congressional Defense Procurement Policy

10 U.S.C. § 2301 states congressional policy for defense procurement. The Panel has recommended amendments incorporating several of its objectives — stated above in the introduction — into the existing statements of congressional policy in a manner that preserves congressional intent and clarifies priorities. The proposed changes provide a clear recognition of the need for an optimum balance between efficiency, full and open access to the procurement system, and sound implementation of socioeconomic policies. The Panel believes that it is both accurate and useful to recognize in congressional policy that there are trade-offs and compromises required between worthwhile objectives. It also has recommended clear policies on preferences for commercial and nondevelopmental items, appropriate allocation of risk between the government and contractors, and fair and expeditious resolution of protests and disputes through uniform interpretation of laws and regulations.

Definitions

In 10 U.S.C. § 2302, "Definitions," the Panel has recommended a new definition of "commercial item" and the relocation and refinement of the definition of "nondevelopmental item" from 10 U.S.C. § 2325(d). Greater reliance on, and consistency with, section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. § 403) and increase in the authority to procure outside the United States in support of contingency operations, as defined in section 101(47) of Title 10, have been proposed.⁵⁰

The Panel considered amending this and other CICA-related statutes to provide a definition for the term "adequate and effective competition" and the conditions under which such competition could be used. The Panel perceived situations in which the responses received to a solicitation did not warrant the expense of preparing, reproducing, and distributing solicitation documents, but also noted that as the technology of electronic data interchange (EDI) matures, the costs of preparing and publicizing solicitations are likely to decrease.

The Panel was particularly mindful of concerns expressed by Congress when it enacted CICA,⁵¹ and the Panel concluded, based upon its own knowledge and experience, that there would be great difficulties involved in precisely defining "adequate and effective competition," as well as significant possible unintended consequences of the adoption of that standard. The Panel concluded after extensive discussion that retreat from the "full and open competition" standard was neither warranted nor wise.

Competitive Statutes

There are 14 statutes, codified in Titles 10, 40, and 41, which, together with the procurement protest system, provide the fundamental framework for the system of competitive procurement in DOD.⁵² When applied in conjunction with the Truth in Negotiations Act at 10 U.S.C. § 2306a,⁵³ these statutes also provide the fundamental framework for sole-source or limited-source negotiations under exceptions to the general requirement for full and open competition, including the methods for selection and award of architect-engineering services.

Four of these statutes are on the critical path of every procurement. Section 2304 of Title 10,

⁵⁰ See the analysis at Chap. 4.1 of the Report.

⁵¹ See Chap. 1.1 of the Report.

⁵² See Chapters 1.2 and 1.5 of the Report for analysis of competitive statutes and procurement protest, respectively.

⁵³ See Chap. 1.3 of the Report.

"Contracts: competition requirements," provides the fundamental requirement for full and open competition, as well as the exceptions and the methods for justifying these exceptions. It also provides the statutory basis for inclusion in the regulations of simplified procedures for small purchases. Section 416 of Title 41, "Procurement notice," prescribes the public notice requirements for procurements to ensure prospective offerors are aware of solicitations to be issued and awards made. Section 2305 of Title 10, "Competition: planning, solicitation, evaluation, and award procedures," prescribes these processes, both for sealed bids and competitive proposals. Section 2306 of Title 10, "Kinds of contracts," provides broad latitude for the kinds of contracts that may be used, places limitations on fees in cost type contracts, and prohibits cost-plus-a-percentage-of-cost contracts. Taken together then, these four statutes tell when to compete, how to compete, and what kinds of contracts may be used. The Panel concluded that these four statutes, including the fundamental requirement for full and open competition, continue to provide a sound framework for conducting the DOD procurement process in an open, fair, and ethical manner, while meeting mission requirements. The most important recommendations on these four statutes are summarized here.

The Panel recommended 10 amendments to section 2304, "Contracts: competition requirements." All but one of these are procedural or are necessary to implement other recommendations of the Panel. These include amendment of section 2304(g) to provide for simplified procedures in the Federal Acquisition Regulation for purchases of property or services with a value not in excess of the new \$100,000 "simplified acquisition threshold."⁵⁴

The Panel's major substantive recommendation for amendment of section 2304 is to delete the authority and rule structure for master agreements for advisory and assistance services, cur-

rently at section 2304(j), and substitute a completely new section 2304(j). This new section would set forth in law the recognition of the legitimate need for contracts that do not procure or specify a firm quantity of supplies or services, the use of proper delivery or task orders under such contracts, and the criteria that such contracts must meet in order for the delivery or task orders issued under them to be exempt from the notice requirements of 41 U.S.C. § 416 (synopsis or posting requirements) and from separate competition or approval of a justification under section 2304(f).

Since the master agreement authority of section 2304(j) is limited to advisory and assistance services and includes many restrictions on award, duration, and competition of individual task orders, the Panel believes that it was a sincere, but not entirely successful, attempt to address one very important portion of a larger problem. The Panel believes that its recommended statutory rule structure will meet the legitimate needs for having contracts in place to responsively provide supplies or perform services when the quantities, timing, and exact nature are not known in advance. As important, it will help to prevent the improper use of such contracts to avoid competing new or expanded requirements when competition is appropriate. It will also ensure proper approval of the justification when competition is not appropriate.

Among the proposed amendments to section 2305, "Competition: planning, solicitation, evaluation, and award procedures," three are an integral part of implementing the Panel's recommended improvements in the protest process. These proposed amendments would:

- Require regulations which address the debriefing of unsuccessful offerors to help eliminate needless protests. The Panel believes timely and meaningful debriefings should be a statutory requirement, but the detailed re-

⁵⁴ See Section III of this Summary as well as Chap. 4.1 of the Report.

quirements of a debriefing should be left to the regulations.⁵⁵ These regulations would accomplish three things: (1) establish criteria for determining whether a debriefing is required; (2) provide that any required debriefing be conducted to the maximum extent practicable within 15 calendar days after award; and (3) provide that the debriefing address the strengths and weaknesses of the unsuccessful proposal.

- Require contracting activities to establish, and provide local access to, a protest file containing releasable information, in order to help prevent unnecessary multiple protests on the same proposed contract award.
- Grant to the agency head the same authority to pay bid and proposal costs and legal fees as the Comptroller General has, when the agency determines a solicitation, proposed award, or award does not comply with a statute or regulation.

The Panel recommends four amendments to section 2306, "Kinds of contracts." Three of these are procedural or needed to implement other Panel recommendations. The major recommendation is to amend section 2306 by deleting subsection (c), which requires a delegable determination by the head of an agency before use of a cost-reimbursement or incentive contract. Congress has recently favored cost-reimbursement contracts for research and development of major systems. Because contract-type selection is an integral part of the acquisition strategy and planning processes, the Panel believes the separate written determination is unnecessary.

The Panel recommends five amendments to 41 U.S.C. § 416, "Procurement notice," and makes one recommendation for future consideration by the Congress. Several of these amendments were discussed in section III of this summary

under "Simplified Acquisition Threshold." These amendments to section 416, as well as additional changes, are summarized here:

- Amend section 416 by replacing "small purchase threshold" with "simplified acquisition threshold."
- Amend section 416(a)(1)(B) to harmonize the dollar threshold for posting notices at the contracting office at \$10,000 for both DOD and the civilian agencies. Also, this amendment would permit agencies to fulfill or supplement posting requirements through automated means, subject to rules to be issued by the Administrator for Federal Procurement Policy.
- Add section 416(a)(1)(D) to generally require automated means for transmitting solicitation and award notices for publication in the *Commerce Business Daily* (CBD).
- Add section 416(e) to allow the use of automated systems for actions under the simplified acquisition threshold.

As a result of the above amendments, fewer procurement actions will require publication in the CBD.⁵⁶ To prevent any potential adverse impact on competition, the new section 416(e) would require the Administrator for Federal Procurement Policy to issue rules to accomplish notice through automated means and to take into account the costs of automated means and their availability to offerors, including small businesses.

- Add section 416(a)(4) to increase flexibility when setting deadlines for submission of offers for commercial items.

Section 416(a)(3) establishes minimum time periods that offerors have to prepare their bids or proposals after notice is published in the CBD.

⁵⁵ See Chap. 1.2.2 of the Report.

⁵⁶ See Chap. 1.2.9 of the Report.

The Panel believes the time periods may be excessive when the product sought is a commercial item. For example, a supplier may already have an existing catalog which describes the item and shows the market price of a commercial item and therefore does not need the usual 30 days to submit a bid. The present law precludes setting a shorter time for the submission of bids and proposals and thus builds unnecessary delay and attendant costs into the acquisition process. The proposed section 416(a)(4) exempts commercial items from the statutory time constraints and directs the Administrator for Federal Procurement Policy to issue rules published in the FAR which prescribe the appropriate time periods.

- The Panel recommends that Congress consider alternative publication methods for actions above the simplified acquisition threshold.

The Panel does not at this time advocate use of automated systems in lieu of publication in the *CBD* for actions over the simplified acquisition threshold because that publication is at present the only standardized, uniform repository of such procurement information. As the technology evolves and experience is gained, the Panel recommends that Congress consider alternative publication methods above the simplified acquisition threshold and, when appropriate, authorize the issuance of new uniform and government-wide regulations.

The Panel recommends retention of 41 U.S.C. § 418 and 10 U.S.C. § 2318, both entitled, "Advocates for Competition," but with obsolete material in section 2318(c) to be repealed. The Panel considered in its discussions whether competition is sufficiently institutionalized in DOD to permit the elimination of competition advocates. The Panel concluded that, in an environment of decreasing budgets, fewer new programs, and greater reliance on upgrades and modifications

of existing systems, it may be very difficult to maintain current levels of competition or to improve them further. For that reason, and in light of their expanded role as advocates for commercial and nondevelopmental items, the Panel concluded that the competition advocates should be retained.⁵⁷

Truth in Negotiations Act

Section 2306a, "Cost or pricing data: truth in negotiations," often referred to as "TINA," clearly impacts the critical path of many large-dollar contracts awarded without price competition and many significant contractual modifications. Several public and private sector commenters focused on the need to amend TINA, or its regulatory implementation, in order to better facilitate the procurement of commercial items and make it easier for the government to buy from commercial entities. Commercial company accounting systems do not normally produce the detailed cost and pricing data required under TINA and do not segregate or record costs according to government accounting requirements.

After consideration of comments, analysis of the law, and full consideration of the many related presentations concerning TINA and the overall subject of procurement of commercial items, the Panel concluded that the threshold for application of the statute should be stabilized and the statute should be amended to facilitate acquisition of commercial items.⁵⁸ The three most significant of the Panel's six recommended amendments to the statute are:

- To maintain the dollar threshold for application of the statute constant at \$500,000 by eliminating all words in the statute that refer to the threshold reverting to \$100,000 after December 31, 1995, and repeal section 803 of the National Defense Authorization Act for FY 1991 (Pub. L. No. 101-510), as amended.

⁵⁷ See Chapters 1.2.5 and 1.2.10 of the Report.

⁵⁸ See Chap. 1.3 of the Report.

- To add a specific exception in subsection (b)(2) for modifications to contracts or subcontracts for commercial items or services when the modification exceeds the threshold, but does not change the commercial item or service to a noncommercial item or service or the modification is issued solely to purchase a commercial item or service.
- To expand and clarify the exception for adequate price competition as stated in subsection (b) by adding a new subsection (b)(3), providing that a procurement can be exempted from TINA under the adequate price competition exemption if: (1) the price is fair and reasonable, and (2) the item is to be purchased from a company or business unit that produces the same or similar item for the commercial market using the same or similar commercial production processes used to produce the offered item for the government.

Over the past decade, the threshold for applying TINA to DOD, NASA, and Coast Guard contracts has fluctuated between \$100,000 and \$500,000. The first amendment listed above would provide consistency, take into account inflation since 1962, and maintain the threshold at the general level that applied when the statute was originally passed. Stability will assist both government and industry in planning their contract surveillance or accounting systems and will appropriately balance the risk to the government against the administrative costs of auditing and pursuing alleged defective pricing cases. The specific requirements of Pub. L. No. 101-510, as amended, which call for a review and report by the DODIG on the threshold change, would be inconsistent with stability and predictability in the threshold.

The Panel agreed that there is a legitimate concern by commercial companies about the application of TINA to modifications. If a commercial company, whose accounting system will not produce the cost or pricing data required by TINA, wins a large contract for a commercial item or service under adequate price competi-

tion, it may become subject to submission of certified cost or pricing data if a modification in excess of the threshold is needed, but the price of the modification, itself, is not based on adequate price competition. The recommended exemption is limited to only those circumstances under which the contracting officer should be able to determine the reasonableness of the price of the modification by price analysis and comparison to the price(s) under the basic contract.

The last amendment listed would remove unnecessary impediments to the use of commercial items and leading edge technology. Specifically, by permitting the contracting officer to consider the same or similar items produced under the same or similar production processes as the contractor's commercial items, proper consideration will be given to the actual operation of market forces in the determination of a fair and reasonable price. Use of the term "same or similar item," recognizes the dynamics of the marketplace where commercial items are frequently undergoing changes: (1) to meet customer-specific needs; (2) to use new technologies; and (3) to incorporate so-called planned product improvements.

The proposed amendment provides for the consideration of several different factors in determining if an item meets the proposed criteria for the adequate price competition exemption and is offered at a fair and reasonable price. Consideration may be given to the prices of alternate items that perform the same or similar functions. This would allow the government to compare, for example, the prices of items manufactured with new technologies or processes to items manufactured with older technologies or processes. Consideration may also be given to the prices at which the offeror has previously sold the same or similar items and to the existing commercial practices of contractors and subcontractors. Under this last consideration, where a subcontract price is established through the use of existing vendor business relationships and pricing methodologies regularly used for commercial production, this factor may support a determination of a fair and reasonable price.

The proposed amendment also links the adequate price competition exemption more directly to the use of market research techniques. Consequently, the Panel believes there will be a need for better training of contracting and requirements personnel in market research and price analysis techniques, as well as meaningful, thoughtful, and innovative regulatory implementation.

Research and Development

Nineteen statutes analyzed by the Panel provide the general statutory framework for research and development.⁵⁹ Among the Panel's 14 recommendations, the two most important are:

- Amend section 2358, "Research projects," to clarify that advanced, as well as basic and applied, research and development should be included in the scope of authority granted in the statute and that these authorities should be clearly provided to both the Secretary of Defense and the Secretaries of the military departments. Implementation of this recommendation will make section 2358 the fundamental statute providing authority for performing research and development projects and permit the repeal of sections 4503 and 9503, which are Service-specific statutes for the Army and Air Force, respectively.
- Amend section 2371, "Advanced research projects: cooperative agreements and other transactions," to delete "advanced research projects" from the title and delete the subsection which provides authority that would be redundant with section 2358 when amended as recommended by the Panel. The net effect is to amend section 2371 to focus its necessary and very useful provisions more clearly on the use of cooperative agreements and other transactions for research and development.

Other Related Statutes

The Panel analyzed twelve codified statutes, as well as two uncoded sections of National Defense Authorization Acts, generally related to contracting authorities and delegations, contractual terms and conditions, or limitations on contracting.⁶⁰

Among other recommendations contained in Chapter 1.6 of the Report is the amendment of section 2310, "Determinations and decisions," to allow determinations and decisions to be made for a class of purchases or contracts, "except when expressly prohibited under this title." This amendment, along with conforming amendments to section 2304, places the restrictions on class determinations and decisions in the relevant statute. It also clearly distinguishes class justifications and approvals permissible under section 2304 from the class determinations made by agency heads prohibited by section 2310.

Also, the Panel recommends amendments to section 2326, "Unfinitized contractual actions: restrictions" as follows:

- Amend section 2326(b) to remove limitations prior to definitization that are stated in terms of expenditures and rely instead on limitations stated in terms of obligations. This recognizes that the government indirectly controls expenditures by limiting the government's liability to the amount obligated.
- Add section 2326(b)(4) to allow waiver by the head of the agency of the percentage limitations on obligations prior to definitization, if necessary to support a contingency operation as defined in 10 U.S.C. § 101(47)⁶¹ or otherwise in the best interests of the United States. Contractors should not unreasonably be dis-

⁵⁹ See Chap. 1.4 of the Report.

⁶⁰ See Chap. 1.6 of the Report.

⁶¹ See National Defense Authorization Act for FYs 1992 and 1993, Pub. L. No. 102-190, § 631, 105 Stat. 1290, 1380 (1991) (defining "contingency operations").

couraged from meeting urgent requirements because the time to award a definitive contract may exceed the time to physically deliver or perform.

Section 2329, "Production special tooling and production special test equipment: contract terms and conditions" is recommended for repeal. It requires regulations to implement complex and detailed requirements concerning payment for, and amortization of, the cost of production special tooling and test equipment. This section was an appropriate congressional response to a controversy and a lack of uniform DOD-wide policy. Based on significant changes in both the circumstances and the statutory role of the Director of Defense Procurement in approving regulations and clauses, the Panel believes that this subject can again be handled in the regulations, with assurance of uniform and equitable policies.

PROCUREMENT PROTESTS

In adopting CICA in 1984, Congress recognized the vital role of procurement protests in assuring full and open competition, and stated that formal protest proceedings were essential because:

. . . . (A) strong enforcement mechanism is necessary to insure the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief.⁶²

Today, parties who object to agency actions in connection with the award, proposed award or procurement solicitation can file a formal protest in four different protest forums external to the contracting agency. Because of the distinct

history and statutory basis of each of these forums, the procedural and substantive law varies by forum, as does the nature of the remedies available. A brief description of these forums as well as the Panel's recommendations to increase the efficiency and effectiveness of bid protest remedies follows.

GAO Protests⁶³

At the GAO, protests are resolved through written decisions initiated by a letter outlining the basis of the protest. The GAO will consider protests which object to the terms of a solicitation, a proposed award or award of a contract, and must generally decide protests within 90 working days. The GAO normally bases its decision on the written agency report submitted in response to the protest and the protester's written comments to the agency report. In order to develop a full record on the protested action, a protester may request the agency to submit to the GAO additional agency records with the agency report. Where appropriate, the GAO may conduct hearings and receive sworn testimony on contested issues of fact. Hearings are the exception rather than the rule under the GAO procedure.

If the agency action is found to be in violation of law or regulation, the GAO may grant the protest and may recommend that the agency cancel the solicitation, award a contract to another bidder, cancel an award, or take other such appropriate action. Additionally, the GAO may award bid and proposal costs or legal fees incurred during the protest. If a protest is filed with the GAO before contract award or if the agency is notified by the GAO of a protest within 10 calendar days after contract award, agencies must ordinarily suspend contract award or stop work on awarded contracts.

⁶²H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1435 (1984), reprinted in 1984 U.S.C.C.A.N. 1445, 2123. See also H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1430 (1984), reprinted in 1984 U.S.C.C.A.N. 1445, 2118.

⁶³The GAO protest procedures are set out in detail in the GAO bid protest regulations, 4 C.F.R. Part 21.

GSBCA Protests⁶⁴

The Administrator of the General Services Administration coordinates the procurement of Automatic Data Processing Equipment (ADPE) and services by federal agencies, including a portion of DOD procurements.⁶⁵ In furtherance of this authority, the Administrator either procures the ADPE or issues a delegation of procurement authority (DPA) to authorize the purchase of ADPE by an agency.⁶⁶ The actual procurements are conducted by the agencies under their procurement statutes. The GSBCA bid protest authority is limited to those ADPE procurements for which a DPA is necessary.⁶⁷

The GSBCA can conduct a formal adjudicatory-type procedure to resolve a protest. Protests filed with the GSBCA must be resolved to the maximum extent possible within 45 working days. The GSBCA procedure typically begins with an initial conference. At that time, an administrative judge establishes a process for conducting discovery and may establish a limitation on the amount of discovery. The judge also establishes a time period for completion of discovery and for filing of dispositive motions. If a protest is filed before contract award or within 10 days of contract award, the GSBCA holds a hearing to determine whether to suspend the agency DPA. If the DPA is suspended, agencies are precluded from making award of a

contract where the protest is filed before award or from allowing continuance of performance of the contract in those cases where the protest is filed after award.

Under the GSBCA's procedures, agencies are required to file the record of the agency decision forming the basis of the protest. At the conclusion of discovery, and well before the end of the 45 working day period for a decision, the GSBCA may conduct an evidentiary hearing on the protest. The typical hearing is completed in less than three days. Following the hearing and receipt of briefs from the parties, the GSBCA issues its final decision. Decisions of the GSBCA may be appealed as a matter of right to the Court of Appeals for the Federal Circuit by either the government or any interested party.

Judicial Protests⁶⁸

Protests filed in the district courts or the Court of Federal Claims (CFC) proceed in a manner similar to those filed before the GSBCA.⁶⁹ Parties filing protests in the courts file a complaint generally seeking both a declaratory judgment that an agency action was improper and a temporary restraining order or preliminary injunction to stop the agency from proceeding with award or performance of a contract.⁷⁰ Before any hearing is held, the courts will often allow limited discovery. No prescribed time periods exist for

⁶⁴ Refers to the General Services Board of Contract Appeals. GSBCA bid protests are governed by the GSBCA Rules of Procedure, 48 C.F.R. §§ 6100-6199.

⁶⁵ Under the "Warner Amendment," the jurisdiction of the GSA over ADPE does not extend to DOD ADPE if the function, operation, or use of the ADPE involves intelligence activities or the command and control of military forces, or is equipment which is an integral part of a weapon or weapons system, or is critical to the direct fulfillment of military or intelligence missions. Department of Defense Authorization Act of 1982, Pub. L. No. 97-86, § 908(a)(1), 1982 U.S.C.A.N. (95 Stat.) 1117, 40 U.S.C. § 759(a)(3).

⁶⁶ 40 U.S.C. § 759.

⁶⁷ *Id.*

⁶⁸ The 1991 *Report of the American Bar Association Public Contract Law Section Bid Protest Committee Courts Subcommittee Project* contains a thorough discussion of the bid protest procedures in federal courts.

⁶⁹ Congress recently changed the name of the United States Claims Court to the Court of Federal Claims. See Federal Courts Administration Act of 1992; Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 907(a) & (b).

⁷⁰ See e.g., 28 U.S.C. § 1491(a)(3).

resolution of bid protests filed in the courts, and there are no prescribed rules for issuance of decisions. Protests are often disposed of by the grant or denial of a preliminary injunction. In many cases, this grant or denial is not accompanied by a formal decision. Upon appeal of either party, decisions of the district courts may be reviewed as a matter of right to one of the 12 regional courts of appeals. Decisions of the CFC are reviewed on appeal by the Court of Appeals for the Federal Circuit.

Panel Recommendations

The Panel adopted the following four principles to provide guidance in formulating its recommendations for changes to the bid protest system:

- Disappointed bidders and offerors should have reasonable access to the reasons for adverse agency actions.
- Contracting officers, like other government officials, are entitled to a presumption of regularity for their actions.
- Protests should be resolved in a fair, expeditious, and efficient manner.
- Overlapping, duplicative, and conflicting protest procedures should be eliminated.

Based on the above guidance, the Panel made a series of recommendations to the existing bid protest system which offer some immediate benefits:

- Precipitous protests can be avoided;
- Greater uniformity in both decisions and practice can be gained among the bid protest forums; and

- The bid protest system will become more efficient and thereby save resources for protesters, intervenors, and agencies.

Moreover, the Panel recommends that Congress consider a more far-reaching reform by replacing the four existing bid protest forums with a single bid protest forum in the executive branch. The Panel fully recognizes that it would be premature to implement this far-reaching reform without considerably more analysis and debate. Regardless of whether Congress eventually finds merit to a single bid protest forum, the Panel believes consideration should be given to the immediate improvements recommended in its Report.

Disappointed Offerors Should Have Reasonable Access to the Reasons for Adverse Agency Action

Frequently, a disappointed offeror can obtain complete and timely information on the reasons for an agency's rejection of its offer only by filing a protest. Providing offerors with more complete and timely information on the reasons for an agency's adverse action would eliminate one of the reasons that cause contractors to file protests.⁷¹ This would, in turn, shorten the procurement cycle, save time, and reduce needless expense. To make this requirement meaningful, the period of suspension should be extended to accommodate the debriefing. For this reason and for other reasons explained in its detailed proposal, the Panel recommends that:

- Offerors be given timely and complete debriefings which provide meaningful information on the strengths and weaknesses of their proposals.
- After contract award, agencies must ordinarily suspend contract performance when-

⁷¹ In *The Protest Experience Under the Competition in Contracting Act* (1989), the Bid Protest Committee of the American Bar Association, Section of Public Contract Law, documented the commonly-held belief that some protests would not have been filed if a meaningful debriefing had been available.

ever a protest is filed within 10 days of contract award or within three calendar days after the date set by an agency for any requested and required debriefing.

The Panel recognizes the effectiveness of protective orders in GAO protests. The use of protective orders was recently instituted through the unilateral actions of the GAO. Protective orders permit interested parties to review competition-sensitive and proprietary information which they otherwise could not review. This practice allows for a more comprehensive examination of the facts with a more equitable decision. The Panel believes that the authority for this useful tool should be permanent. Accordingly, the Panel recommends that the Comptroller General be given express authority to use protective orders to provide access to competition-sensitive or proprietary information to attorneys and technical consultants of the interested parties.

Contracting Officers, Like Other Government Officials, Are Entitled to a Presumption of Regularity for Their Actions

The Panel believes that contracting officer decisions on matters which are entrusted to agency discretion should be upheld in a protest if the government is able to provide a reasonable basis for the contracting officer's actions. However, the government does not have unfettered discretion to conduct business with the suppliers it chooses. It must comply with the laws and regulations governing the federal procurement process. Indeed, the legislation authorizing the GAO and the GSBCA protest procedures specifically instructs that relief can be granted where the agency action violates law or regulation.

The need to adhere to laws and regulations which provide for competition is grounded in sound public policy. As the Court of Appeals for the Eleventh Circuit has stated, "the public and ...bidders have a strong interest in certainty in the bidding process.... To achieve this certainty,

strict adherence to the procedures for bidding is necessary."⁷² A logical corollary to this principle is the need for consistency among the various protest forums as to how a protest is reviewed. A single standard of review for all protest forums will result in increased consistency and greater certainty in result, will reduce forum shopping, and will enhance the perception that the protest system is fair. Accordingly, the Panel recommends the establishment of a single standard of review for agency actions that authorizes the courts, like the GAO and the GSBCA, to set aside agency action which violates procurement law or regulation. On matters committed to agency discretion, the agency should be required to establish a reasonable basis for its actions.

As an additional enhancement of the bid protest system's integrity, the Panel recognizes a need to provide for a penalty for those who bring a protest knowing it is baseless or, after having discovered that fact, continue the protest. While the Panel believes that this situation is relatively uncommon, the very presence of this penalty will deter frivolous protests and will add to the overall perception that the entire process is fair and even-handed. Accordingly, the Panel recommends that where the GAO, the GSBCA, or a court expressly finds that a protest is frivolous or not filed or pursued in good faith, the government should be entitled to recover its costs in defending against the protest.

Protests Should be Resolved in a Fair, Expeditious and Efficient Manner

Although protests further the government policy of competition, protests also delay the procurement of services and supplies necessary for efficient and effective government operation. It is essential, therefore, that protests be both fairly and expeditiously resolved. In enacting CICA, Congress recognized this principle and required the GAO and the GSBCA by statute to resolve protests expeditiously. The courts should be similarly obligated. Accordingly, the Panel rec-

⁷² *Choctaw Manufacturing Co., Inc. v. United States*, 761 F. 2d 609, 619 n. 17 (11th Cir. 1985).

ommends that the courts, like the GAO and the GSBCA, should be directed by statute to resolve protests expeditiously.

The Panel also believes that any impediment to early resolution and settlement of a protest where appropriate should be removed. One impediment is the perceived inability of a contracting agency to completely resolve and settle a protest by the payment of bid and proposal costs and legal fees. Currently, if an agency determines that there is merit to a protest, the agency can take action to resolve the protest, but some believe it is not clear that an agency can pay bid and proposal costs, attorneys fees, or consultant and expert witness fees associated with the protest. With an express grant of authority to pay such expenses for meritorious protests, the agencies may completely resolve and settle such protests at any stage of the protest and avoid unnecessary administrative and legal expenses. Accordingly, the Panel recommends that agencies be given express authority to pay bid and proposal costs, attorney fees, and consultant or expert witness fees in order to settle meritorious protests.

The Panel has also identified several changes to the procedures of the two administrative protest forums. These changes are intended to streamline the protest process, encourage use of express protest procedures, and institute provisions to use electronic filings to speed the processing of protests. Accordingly, the Panel recommends that:

- Whenever possible, amended protests should be resolved within the statutory time period established for resolution of initial protests.
- The GAO should have the authority to resolve protests under an express option which, like GSBCA protests, requires the GAO to render a decision within 65 calendar days.

- The GAO and the GSBCA should issue procedures which allow for electronic filing of protest documents.
- The GAO and the GSBCA should use the term "calendar day" and not "working day" to specify when statutory deadlines should be met.

Overlapping, Duplicative, and Conflicting Protest Procedures Should be Eliminated

The existence of four bid protest forums has naturally resulted in inefficiencies. The most glaring inefficiency is found in the current system of judicial protests. It arises out of the jurisdictional problems created by the Federal Courts Improvement Act of 1982 (FCIA). The FCIA created two fundamental jurisdictional problems. First, FCIA states that the CFC has "exclusive jurisdiction" to consider pre-award protests.⁷³ In the past 10 years, at least five courts of appeals have addressed whether this removes the preexisting jurisdiction of the district courts to review pre-award protests under the Administrative Procedure Act. The courts are split on this issue.⁷⁴ Second, the Court of Appeals for the Federal Circuit has ruled that the bid protest jurisdiction of the CFC is limited to protests filed by parties submitting bids or proposals.⁷⁵ As a result of this ruling, numerous decisions have been issued holding that the CFC had no jurisdiction to hear all the types of protests routinely considered by the GAO, GSBCA, and the district courts. These types of protests include those filed before bids or proposals are submitted, which allege that a solicitation unduly restricts competition.

The Panel concluded that the best way to end this jurisdictional confusion is by eliminating district court jurisdiction. The Panel has identified no substantive justification for having two forums with the same jurisdiction, as some have

⁷³ 28 U.S.C. § 1491 (a)(3).

⁷⁴ *Cubic Corporation v. Cheney*, 914 F. 2d 1501 (D.C. Cir. (1990)), discusses the cases decided by the respective circuits regarding whether 28 U.S.C. § 1491(a)(3) divests district courts of pre-award protest jurisdiction.

⁷⁵ *United States v. Grimberg*, 702 F. 2d 1362 (Fed. Cir. 1983).

recommended. In choosing the appropriate forum for the judicial protest authority, the Panel considered the need to provide a knowledgeable entity that would be reasonably available to protesters and which could handle the number of protests that have been historically brought in the courts.

The Panel concluded that the CFC was best suited for this responsibility for several reasons. First, as stated in the Panel's objectives, there is a need for uniform interpretation of procurement laws to govern the conduct of tens of thousands of contracting personnel in both government and industry — divergent opinions can and do occur in the hundreds of district courts and in the 12 regional federal circuits undermining the essential need for uniform and predictable guidance for DOD on procurement laws and regulations. Second, in complex protests, the government, protester, and other interested parties are often located in different parts of the country, and the CFC, which has nationwide jurisdiction, is the only court with jurisdiction over all of the parties. Third, the judges on the CFC are also far more experienced in government contract issues than district court judges. Fourth, judges of the CFC are authorized to, and do, conduct hearings around the country, and therefore can be available to protesters outside Washington, D.C. Finally, amendments suggested by the Panel to the statutory jurisdiction of the CFC can eliminate any possible restrictions on the ability of the court to provide complete relief to disappointed bidders. Accordingly, the Panel recommends that:

- The CFC should be the single judicial forum with jurisdiction to consider all protests that can presently be considered by any district court or by the CFC.
- The CFC should be authorized to set aside agency actions in protests which establish that the agency has violated procurement law or regulation; it should be authorized to provide relief including the award of attorney fees to a successful protester, comparable to that provided by the GAO and the GSBICA.

Single Protest Forum

The Panel found no sound public policy reason for maintaining four protest forums. To the contrary, in the eight years since four forums have been available, divergence has occurred in decisions on some fundamental issues ranging from jurisdiction to timeliness. Some inefficiencies and delays inevitably result from this divergence, as the government is required to reconcile conflicting interpretations. Substantial differences also exist in the practices and procedures of the various forums which lead to further inefficiencies.

Accordingly, the Panel recommends that Congress consider whether the federal acquisition process can be better served by a single protest forum within the executive branch rather than the four existing bid protest forums. If such a single forum were adopted, the Panel believes that it should offer at least two forms of procedure: (1) a simplified procedure for protest resolution, similar to that now available at the GAO, and (2) a formal trial-type proceeding, similar to what is now available from the GSBICA. Smaller contracts would be considered under the simplified protest procedure. Protests for larger contracts could be considered under either procedure by election of the parties. Decisions of the exclusive bid protest forum could be appealed to the Court of Appeals for the Federal Circuit.

Protests for all types of procurements could be considered by the new forum under the trial-type proceeding. This recommendation would thus expand the types of contracts for which trial-type hearings would be provided and would include all federal agency procurements. The Panel believes this expansion is warranted by the congressional endorsement of the use of adjudicatory proceedings for bid protests. The Panel further believes that there is simply no justification for distinguishing between ADPE contracts and other types of contracts in determining whether or not to grant an adjudicatory proceeding. It is the opinion of the Panel that this adjudicatory proceeding would serve as a

meaningful replacement for the judicial protest procedures of the district courts and the CFC.

The Panel recognizes that there are certain disadvantages to this recommendation. For example, the GAO and the GSBCA provide well-defined procedures for resolving protests and have the strong support of Congress. The Panel's recommendation would replace these procedures with a new and untried procedure that could lead to unintended problems. Therefore, care must be taken to preserve the expertise, resources, and precedents of the GAO and the GSBCA. The Panel also recognizes that trial-type proceedings for all contracts impose additional burdens on federal agencies and on contractors. The Panel therefore believes that the trial-type proceeding should be coupled with a uniform standard of review, as well as common-sense protest procedures and strict time limits similar to those adopted by the GSBCA.

CONTRACT ADMINISTRATION

The contract administration process involves those activities necessary to ensure that the parties fulfill their respective obligations under the contract — a process which runs from the day the contract is awarded through its completion and close-out.⁷⁶ It includes: monitoring the contractor's performance at a level deemed appropriate to ensure the quality of the services or product, adjusting the specifications and pricing of the contract as necessary to reflect changes in the work to be done, formally accepting the services or product to allow for contract payment, and resolving disputes. The Panel's statutory mandate to streamline the acquisition process and eliminate laws unnecessary for the establishment and administration of the buyer-seller relationship has particular application to laws relating to contract administration. That process should produce the most efficient means of ensuring contract compliance by implementing laws that can be easily located, understood, and administered. In particular, the tens

of thousands of companies — ranging from the largest multidivisional companies to countless "Mom and Pop" operation — should not have to seek extensive advice of counsel or assistance from their elected representatives to locate and understand the laws that relate to contract compliance with their customer: the government. The government's costs in administering contracts should also be proportional, while those of the contractor should be limited to the minimum needed to demonstrate compliance with contract terms and conditions. These factors are especially important in reducing barriers to commercial-military integration and facilitating the entry of small businesses into the defense marketplace.

Contract Payment

The 15 laws relating to payment were among the most duplicative, dispersed, and difficult to understand of any of the contract administration laws. The Panel recommends consolidating a number of these laws into a single statute, renamed "Contract financing," and adding statutory guidance on making payments with special attention to the needs of small businesses.⁷⁷ In addition to recommending repeal of several outmoded statutes, the Panel recommends amending the Prompt Payment Act (31 U.S.C. §§ 3901-3907) to change the procedures for computing discounts, in order to correct recent statutory changes to this act, which have slowed rather than expedited payment to contractors.

Cost Principles

Consistent with the Panel's objective of placing policy guidance and basic concepts in law while leaving implementation to regulations, the Panel recommends that 10 U.S.C. § 2324 ("Allowable costs under defense contracts") be amended to eliminate detailed proscriptions regarding individual cost elements, and to provide guidance on total costs, on what constitutes a cost, and cost allowability.⁷⁸ The current statute contains a

⁷⁶ See Chap. 2 of the Report.

⁷⁷ See Chap. 2.1 of the Report.

⁷⁸ See Chap. 2.2 of the Report.

comprehensive listing of specific unallowable costs as well as a provision assessing penalties for their inclusion. The Panel's review determined that this statute was passed in response to several highly-publicized cases of contractor abuse discovered by government auditors in 1985. There was extensive subsequent implementation of this statute in the FAR and DFARS; however, the specificity of the provisions prevented regulatory changes. The Panel believes that the regulatory process is a more flexible alternative for addressing changing situations and specific problems in the acquisition process. The Panel recommends that the specific provisions addressing allowable costs be deleted from 10 U.S.C. § 2324 and guidance continued in the regulations. By recommending this amendment, the Panel notes that it is not making any judgment on the substantive issues of allowability or allocability nor is it, in any way, urging the repeal of the cost principles already present in the regulations.

Contract Audit and Access to Records

Of the 21 laws identified in this area, 10 U.S.C. § 2313 (Examination of books and records) received the most scrutiny and became the centerpiece of the Panel's recommendations. The Panel recommends that a consolidated audit and access to records statute be enacted by the Congress, eliminating duplication or outmoded elements, while adding exemptions and new categories of contracts to be audited.⁷⁹ Consistent with its objective of facilitating the purchase of commercial items, the Panel recommends that 10 U.S.C. § 2313 be listed as one of the statutes inapplicable to procurement of commercial items.

Cost Accounting Standards

The Panel's consideration of cost accounting standards focused on the impact of these standards on the purchase of commercial items. The

Panel was informed of an increasingly prevalent practice of DOD suppliers maintaining separate production facilities for commercial and DOD work due to the additional costs occasioned by DOD laws and regulations such as the cost accounting standards. Many suggestions for changes to the standards or their application to contractors or classes of contractors were made to the Panel. The Panel felt that imposition of these standards could add significantly to the cost of doing business for a basically commercial contractor and that a number of the suggestions for changes to the standards or their application had merit. However, after reviewing the enabling statute for the Cost Accounting Standards Board (CASB), the Panel decided that necessary improvements or reforms could be carried out by the CASB using its existing authority. Thus, the Panel makes no recommendation for legislative action, but recommends that the CASB take early action to consider the issues brought to the Panel's attention. Of particular importance to a strong industrial base and expansion of competition would be regulatory changes to facilitate the purchase of commercial items.

Administration of Contract Provisions Relating to Price, Delivery, and Product Quality

Although not falling into easily recognizable categories such as audit and access to records or cost accounting standards, contract administration laws also cover issues such as product quality, place of delivery, and assignment of contracts.⁸⁰ After reviewing the results of several studies addressing the cost effectiveness of warranties on major weapons — and after hearing both industry and government sources question the utility of a mandatory warranty for major weapons systems — the Panel recommends the repeal of 10 U.S.C. § 2403 ("Major weapons systems; contractor guarantees"). Alternatively, if the Congress continues to mandate the use of

⁷⁹ See Chap. 2.3 of the Report.

⁸⁰ See Chap. 2.5 of the Report.

such warranties, recommendations are made for changes to the current law to meet some of the concerns expressed to the Panel. The authority in 41 U.S.C. § 15, ("Transfer of contracts; assignments of claims; set-off against assignee,") was intended to rectify a problem regarding the acceptance by banks or other lending institutions of "assignments of claims" as collateral — something which seriously undermined the ability of small businesses to bid on government contracts. During its review, the Panel noted that the statute's authority is limited to times of war or national emergency but determined that it should apply at all times and to all contracts covered by its provisions. Specifically, the Panel recommends the retention of this law — which has served its purpose well — but that its application to contracts not be dependent upon a state of war or national emergency.

Claims and Disputes

The primary statute governing contract claims and disputes is the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.⁸¹ The Panel gave extensive consideration to the CDA and other statutes that, taken together, comprise the claims and disputes process. Under the CDA, there is overlapping jurisdiction between the CFC and the agency boards of contract appeals, and any thorough consideration of claims and disputes must take into account whether such duplication is warranted. Congress had choices to make in determining the jurisdiction of the dispute resolution forums and could have chosen, for example, to grant judicial review only after exhaustion of administrative remedies. Alternatively, if the CFC is to have original jurisdiction, a duplicative, heavily proceduralized administrative forum is not, strictly speaking, necessary. The choices have already been made, however, and Congress established what has proven to be a workable system.

After completing its top to bottom review of claims and disputes, the Panel concluded that

while major changes are not necessary, the claims and disputes process does need fine tuning in some areas.

Because some United States District Courts have persistently but erroneously asserted jurisdiction over contract claims under the Little Tucker Act, 28 U.S.C. § 1346, the Panel recommends a clarifying amendment to this statute. Other Panel recommendations would achieve the following: a uniform appeal period of 90 days both at the CFC and the agency boards of contract appeals; a simplified, uniform certification requirement for all contract claims; a \$100,000 threshold rather than the current \$50,000 threshold for claims certification; a \$25,000 threshold rather than the current \$10,000 for accelerated appeals at the boards of contract appeals; and a six-year statute of limitations for the filing of contract claims.

Statutory amendments in section 907 of the Federal Courts Administration Act of 1992 and in the National Defense Authorization Act for FY 1993 have gone a long way to correcting problems with claims certification and also with shipbuilding claims. Few additional adjustments are needed in these areas that have been problematic for the government contracting community in the past.

Extraordinary Contractual Relief

The authority to provide extraordinary contractual relief, now contained in 50 U.S.C. §§ 1431-1435, dates back to a measure taken by the Congress in World War II. Departments and agencies, acting under authority delegated by the President, may award or amend contracts, make advance payments without regard to other laws, or indemnify against unusually hazardous or nuclear risks. More detailed guidance is contained in an executive order and implementing regulations. Comments to the Panel and review of the actions taken pursuant to the law demonstrate its continued need and that the law is being carried out prudently. However, the Panel

⁸¹ The CDA is analyzed in Chap. 2.6 of the Report. On the related issue of the False Claims Act (*Qui Tam*), see the standards of conduct section of this summary and Chap. 6.3 of the Report.

recommends that the law be available for use even when the United States is not at war or in a state of national emergency.⁸² There are contingency military operations or relief operations following natural disasters that make a compelling case for the use of this extraordinary authority at any time.

⁸² See Chap. 2.7 of the Report.

V

DEFENSE TECHNOLOGY AND INDUSTRIAL BASE

In an era of declining defense budgets, the maintenance of a healthy defense technology and industrial base has become a major goal of defense policy. The Panel's review of statutes directed toward industrial base and manufacturing technology — including those within Title 10 — was, however, limited by the fact that the National Defense Authorization Act for FY 1993 repealed most preexisting law and enacted extensive new provisions covering this statute. Since the Authorization Act was passed at the very end of the Panel's deliberations, there was little time to review it. Nonetheless, the Panel recommended a number of initiatives to protect and foster the technology, industrial and mobilization bases, which included:

- Implementation of a Simplified Acquisition Threshold.⁸³
- A proposed subchapter on commercial items.⁸⁴
- A proposed chapter on defense trade and cooperation.⁸⁵
- Amendments to statutes relating to DOD commercial and industrial activities.⁸⁶

As discussed in the opening sections of this summary, one of the primary purposes of recommending a simplified acquisition threshold and broader use of commercial items is to increase the range of companies doing business with DOD. Those recommendations are specifically meant to include those firms whose research, development, plant, and operations are funded largely by private customers, and hence are less vulnerable to defense cutbacks. In addition, these initiatives sought to reduce acquisition law as a barrier to the entry of small businesses into defense contracting, since the Panel was told that small businesses are increasingly the source of cutting-edge technologies needed by DOD.

Exports and International Cooperation

Exports and international cooperation are additional strategies for lessening the cost to DOD of maintaining adequate technology, industrial, and mobilization bases. But exports and international cooperation are clearly two-way streets. Because our allies also seek to export to maintain their industrial bases, our own efforts to increase offshore defense sales will likely be met with demands for offsets from our allies. In addition, a shift of DOD procurement dollars offshore to

⁸³ See Chap. 4.1 of the Report.

⁸⁴ See Chap. 8 of the Report.

⁸⁵ See Chap. 7 of the Report.

⁸⁶ See Chap. 3.5 of the Report.

acquire foreign-made nondevelopmental items or for cooperative research and development efforts has the obvious drawback of making it more difficult to fund competing technologies and industries in the United States. Even if the value of those dollars is multiplied by the contributions of our allies, the long-term effects of such policies may be the permanent (or at least long-term) loss of critical skills and capabilities within the United States. Recognizing that the critical technologies, skills, and capabilities that must be maintained can shift more rapidly than legislation can respond to such shifts, the Panel has proposed a new chapter within Title 10 which would create a statutory structure under which the Secretary of Defense would have the authority to coordinate at the policy and regulation level the potentially conflicting goals of:

- Reducing weapons systems costs by burden-sharing with allies and friendly foreign nations;
- Exporting weapons systems to maintain the U.S. industrial base;
- Reducing acquisition costs by purchasing foreign-made commercial or nondevelopmental items; and
- Fostering critical skills and capabilities at home by restricting procurement to U.S. (or North American) sources.

The proposed chapter is in three parts. The first subchapter covers government purchases of foreign goods by DOD, and consolidates, streamlines, and amends the Buy American Act and 10 U.S.C. §§ 2501 - 2507. Among the major changes are the following:

- In determining whether to purchase foreign goods, DOD is expressly directed to consider the impact of foreign purchases on the defense technology and industrial base, the mobilization base, and other national security concerns.
- The test for determining origin of a good — which is today different under the Buy American Act and the Trade Agreements Act — is standardized to the “substantial transformation test” used in the latter Act.⁸⁷
- Many of the product-specific source restrictions currently found in authorization and appropriations acts are recommended for repeal, with a recommendation that future restrictions not be adopted in an *ad hoc* fashion, but be chosen (if at all) on industrial base and national security criteria and consolidated in a single section of Title 10, where these provisions can be coordinated among themselves.

The second subchapter creates a new statutory structure for international cooperative agreements. Over the past decade, cooperation in research and development between the United States, its allies, and friendly foreign nations has increased, and such efforts offer the promise of lower defense costs through the elimination of duplication of facilities and the sharing of weapons development costs. At the same time, it may be in DOD's interests to maintain a U.S. capability not by cooperating in developing a defense item offshore, but by making the item here and attempting to export that item to our allies in an effort to defray part of the cost of maintaining our industrial base with foreign dollars. Since our allies are also looking to exports to protect and pay for their industrial bases, it is clear that

⁸⁷The Panel chose the Trade Agreements Act definition because (1) it is susceptible to verification without extensive audit, whereas the component-content test of the Buy American Act cannot be verified without extensive audit and examination; (2) commercial companies do not ordinarily determine the components of a commercial item based on country of origin and indeed may change the country of origin of components from time to time as component costs change, so that component-oriented test may inadvertently bar commercial items from procurement by DOD; and (3) the component test can be “gamed” so that it has no obvious relationship to maintaining jobs in the United States, whereas, in almost all cases, the substantial transformation test at least requires final assembly labor to take place in the United States.

the Secretary needs full authority to choose a policy mix of imports, exports, and cooperative efforts if he is going to have all the tools necessary to negotiate for DOD's interests. Whereas the first subchapter gave the Secretary authority to link "Buy American" and "Sell American" policy, the second gives the Secretary the flexibility to create effective international cooperative agreements. Among the major amendments proposed in the second subchapter are:

- The Secretary of Defense is given authority to enter into cooperative agreements at every stage of weapons development, from research and development through procurement.⁸⁸
- Certain provisions in the Arms Export Control Act are consolidated with the provisions currently found in Chapter 138 of Title 10, and amended to permit the Secretary of Defense to treat our allies as co-venturers in a cooperative project rather than as customers subject to arms export control.
- Current laws governing cooperative projects (principally 10 U.S.C. §§ 2350a and 2350b) are combined and amended to permit expenditures of U.S. funds abroad and waiver by the Secretary of Defense of DOD acquisition laws and regulations that impede effective international cooperation.
- The provision for an "ombudsman" for foreign signatories to cooperative agreements in 10 U.S.C. § 2350h is repealed.

The third subchapter on international trade and cooperation covers cross-servicing agreements and standardization of weapons systems within NATO. Existing authorities in these areas were consolidated and minor amendments were made to fill gaps in existing authorities that were discovered during, for example, Operations Desert Storm and Desert Shield.

DOD Commercial and Industrial Activities

As funds for acquisition decline, there has been renewed competition for DOD dollars between private industry and military depots, arsenals, and maintenance facilities. The Panel recognized that a managed build-down must not only seek a balance between foreign and domestic spending, but also within domestic spending, between commercial and government owned and operated facilities and, indeed, among government facilities themselves. The Panel sought to implement this balance by proposing two new sections of law in Title 10, denominated §§ 24XX and 24XY, which would replace existing authorities found in 10 U.S.C. §§ 2461 - 2468. These sections regulate DOD contracting for commercial services under OMB Circular A-76. They include restrictions on the contracting out of core logistics activities by DOD, and set forth specific guidance on depot-level maintenance activities by DOD. The current statutory provisions present a confusing and contradictory set of rules.

The Panel's goal in this area was to consolidate and streamline these conflicting rules into a coherent statement of basic and essential principles that eliminates, as far as possible, unnecessary detail. The Panel also attempted to balance these competing interests into a set of rules that affords the Department managerial flexibility while preserving meaningful congressional oversight and effective community input. To that end, the Panel proposes a single section, 24XX, governing traditional A-76 contracting procedures for the Department. Proposed section 24XX provides that DOD Secretaries shall procure from the private sector, if such source can provide services or supplies adequate to meet defined performance standards at a cost lower than that of an in-house, government source. The proposed section 24XX adopts the current "realistic and fair" cost comparison standard and delineates the types of costs to be

⁸⁸ The third subchapter extends the authority for cooperative agreements through the end of a weapon's life cycle by permitting agreements with respect to logistics and maintenance.

included in that comparison. The proposed section maintains the requirement of federal employee consultation and maintains, in streamlined form, the extant requirement of notice to Congress of intent to study a conversion, as well as notice of the decision itself.

A second section, 24XY, sets forth the basic principles regarding the contracting of core logistics functions by DOD. It restates the basic, core logistics standard and adopts the current definition of "core" but permits military service secretaries to define "core capabilities," and to identify those activities necessary to sustain those capabilities. The proposed section then requires Service Secretaries to perform such core functions in-house. It permits competition among government entities for assignment of such work as a means of encouraging greater economy and efficiency in these activities. In excess of core requirements, the Service Secretaries would be permitted, at their discretion, to use competition to acquire additional maintenance and repair of defense supplies. Such competition may be among maintenance activities owned by the United States, between such activities and pri-

vate firms, or among private firms. However, in order to ensure a level playing field in such competitions, the proposed section requires that all bids "shall accurately disclose all costs properly and consistently derived from accounting systems and practices that comply with laws, policies and standards applicable to those entities." Finally, competitions under this proposed section are exempted from A-76 requirements.

Based on this modification of the current, core logistics section, the Panel recommends the repeal of 10 U.S.C. § 2466. That section sets forth the 60/40 rule regarding DOD contracting for depot-level maintenance; i.e.; that the Department may not contract out more than 40 percent of its depot-level maintenance. The Panel considered, but rejected, application of the same "core" concept to Departmental, in-house manufacturing capabilities. Instead, the Panel recommends consolidation and amendment of the Army and Air Force Arsenal Acts to provide Service Secretaries with discretionary authority to assign defense manufacturing requirements to DOD activities.

VI

INTELLECTUAL PROPERTY AND STANDARDS OF CONDUCT

This section outlines the Panel's findings pertaining to two critical aspects of the acquisition process: intellectual property and standards of conduct. Both of these have significant — although sometimes overlooked — effects upon the defense acquisition system. Despite its importance, for example, intellectual property in DOD acquisition is not particularly well understood, even by many acquisition professionals. It is nevertheless a very critical area, involving ownership and rights in various forms of both tangible and intangible property, rights that affect the development, manufacture, and operation of defense equipment. It includes such things as software, data bases, patents, copyrights, information systems, and technical data pertaining to hardware acquired by DOD. Similarly, those statutes that directly or indirectly affect the procurement process by imposing limitations upon the conduct of government employees, contractor representatives, or contractors are very complex and often misunderstood. The laws regulating both these areas share the common characteristic of having much wider applications than defense procurement. In presenting the following summary, therefore, the Panel recognizes that its recommendations could have a correspondingly broader impact.

INTELLECTUAL PROPERTY

In the past decade there has been a major change in the relationship between the acquisition pro-

cess and the research and development community in the United States.⁸⁹ Prior to the 1980s there was a general assumption that the technology necessary to support DOD could be obtained through direct funding of contracts and grants for research and development and strong support of independent research and development conducted by defense contractors. The Department made use of some technology created in the commercial sector of the economy, but this was thought by many to be peripheral and, perhaps, aberrational. The acquisition policies relating to intellectual property were properly focused on ensuring that the DOD obtained all of the rights in intellectual property that it needed to develop and use weapon systems.

In the 1980s it became more and more apparent that these earlier assumptions were becoming obsolete. As has been documented in the study of the Packard Commission and in the report by the Center for Strategic and International Studies, commercial technology has outpaced DOD technology in a number of areas of vital importance to the development of weapon systems. While the owners of this commercial technology may want to perform work for the government, they are increasingly reluctant to use their best commercial technology if there is a possibility that DOD will take the intellectual property rights in that technology. It also appears that there will be a greater confluence of commercial and DOD technology in the future. This indi-

⁸⁹ The Panel's consideration of the various aspects of intellectual property, including rights in technical data, is contained in Chap. 5 of its Report.

cates that there may be greater opportunities to utilize DOD sponsored technology in the commercial sector of the economy. These premises require a different focus for the intellectual property policies of the Department in the acquisition process. The new focus must be on fulfilling the Department's needs in the least intrusive manner with regard to intellectual property and on maximizing the flow of technology from the commercial sector to DOD and from DOD to the commercial sector.

Both the Congress and the executive branch have recognized this new focus. Congress passed the Bayh-Dole bill in 1980 (35 U.S.C. § 200 *et seq.*) to ensure that small business and nonprofit organizations retained commercial rights to inventions made under government contracts. In 1986, it passed the Federal Technology Transfer Act (15 U.S.C. § 3710a *et seq.*) to require federal laboratories to enter into cooperative research and development agreements sharing technology with the private sector. These new policies were implemented and broadened by Executive Order 12591, April 10, 1987.

The Panel reviewed each law relating to the creation and use of intellectual property in the acquisition process to determine whether it impeded or furthered the attainment of the goals of this legislation and executive order. In making this review it proceeded from three fundamental premises:

- That a company will not generally make the investment necessary to bring a product or service based on sophisticated technology to the commercial marketplace unless it has intellectual property protection in the form of a patent, copyright or trade secret.
- That a company will not generally use technology with strong commercial potential to perform DOD contracts unless it is assured that it retains intellectual property protection in that technology.
- That, as a result of the first two premises, companies are discouraged from integrating their commercial with their military work.

The Panel found a number of laws not fully in accord with the new goals. Its recommendations for change are intended to complete the task which Congress began in 1980.

For purposes of review, the Panel divided the intellectual property laws into four subchapters: (1) Rights in technical data; (2) Technology transfer; (3) Competitiveness of U.S. companies; and (4) Government use of private patents, copyrights, and trade secrets.

The Panel's Approach to the Technical Data Problem

In 1964, the Department modified its data rights policy to allow the government to have "limited rights" in data pertaining to items, components, or processes developed at private expense. These limited rights permitted the government to use the data for its own purposes except that the data could not be used to manufacture the product "in-house," and could not be disclosed to other contractors — effectively barring its use for competitive procurement. This basic policy remained in effect until the early 1980s. At that time, concerns about abuses in spare parts procurement caused Secretary of Defense Weinberger to seek greater rights for the Department in technical data. The result was new military department contract clauses which, for example, required contractors to sell or relinquish their data rights as a condition of award and provided that the government would acquire unlimited rights after a stated period (five years in one widely-used clause).

Congress followed suit by enacting new statutory requirements aimed at acquiring adequate data to permit competitive procurement of spare parts, but also required that the implementing regulations provide a balance between the government's needs for technical data to get competition and the contractor's needs for protection of its proprietary data. The DOD proposed implementing regulations on several occasions, beginning in September 1985. However, they failed each time to satisfy the industry demand for protection of data that was per-

ceived as being vital to maintaining their competitive position in both government and commercial markets.

The inability of the Department to formulate a technical data policy acceptable to all parties is not a result of incompetence or lack of effort but rather of the fact that there are many competing demands that must be met. From the point of view of the Department, it must obtain technical data to meet its many needs with sufficient rights to ensure that the data can be used as necessary. One of the most compelling needs has been to ensure reasonable prices for spare parts through competition. If data is needed to meet that competition requirement, the government must obtain sufficient rights to permit the data to be disclosed to companies that have the capability of manufacturing the product. There is a significant segment of industry that is dependent on obtaining this technical data in order to win contracts to manufacture parts. These companies generally perform little development work but have proved to be efficient manufacturers of parts for the Department. Another segment of industry including many small businesses consists of the major contractors and specialty subcontractors that have invested significant funds in developing new products for the Department as well as for the commercial market. These companies feel the need to protect their technical data in order to recover their investment and maintain their competitive position in the domestic and international market. Reconciling these competing needs has proven to be a formidable task and may never be possible in any perfect sense.

Congress intervened again in the 1992 Defense Authorization Act, pushing DOD and industry toward a resolution of their differences with the creation of another group, the Section 807 government/industry technical data committee. This committee was directed to develop a compromise technical data rule acceptable to both government and industry. The committee is made up of representatives of DOD and the key industry groups (representing prime contractors, and subcontractors) which have a special

interest in how the rule should be structured. Its deliberations were continuing as the Section 800 Panel prepared its report.

Recommendations on Technical Data

After considering various options on how to proceed, the Panel decided to follow a two-pronged approach:

- First, make minimal modifications to the technical data statute, but sufficient to allow the Secretary of Defense the flexibility to explore other ways of treating the issue; and,
- Second, outline a new alternative approach for dealing with technical data that, instead of focusing on rights, focuses on the government's need to ensure reasonable life-cycle costs, ordinarily through competition, for spare parts and other follow-on purchases.

The Panel recommends statutory changes to expand the definition of "technical data" to include computer data bases, manuals, and other publications supporting computer programs while continuing to exclude computer programs themselves from the definition. In addition, the changes limit the law's applicability only to that data called for under a contract — this is consistent with the current regulatory coverage. Finally, the Panel recommends that the law be modified to limit the data acquired for commercial items being offered to the government, reflecting the Panel's goal of encouraging firms to integrate their commercial and military work.

The alternative approach mentioned above focuses not on the distribution of rights between government and industry, but rather on ways to ensure that the government has the means to ensure that reprourement prices are reasonable. As such, it is both new and controversial. However, given the impasse that has existed over the last decade in developing a workable rights policy, the Panel presents this as a new idea to be considered. More work is needed to flesh it out fully and explore all of its implications so that it can be tested in certain programs to be designated by the Secretary of Defense.

The new approach is based on the concept that the government would establish its needs for data on the basis of whether or not this data was necessary to achieve competition. Parts and components would be categorized according to the likelihood of their being repurchased and the cost-effectiveness of subjecting them to full and open competition or limited competition. The government program manager would be responsible for making the final decisions on the categorization, working with the contractor as the system is developed.

Under this approach, the contractor would be contractually obligated to deliver, when needed, a technical data package that was sufficient to permit competition for those parts and components so categorized. The key to this approach is that it recognizes those cases where there is no need for the government to take reprourement rights in a contractor's technical data as long as the government's need to ensure reasonable life-cycle costs is satisfied.

In response to the early drafts of the proposal, both government and industry expressed concern that the process would be under the complete control of the prime contractor. Firms in the breakout community and second-tier vendor base that rely on the availability of technical data packages for their livelihood were particularly concerned that most of the parts and components would be categorized as subject to limited or no competition. Also, since prime contractors would serve as data repositories under the alternative approach, subcontractors and small businesses were concerned that, under the proposed system, any contractor who wanted to compete with the original equipment manufacturer (OEM) in the military marketplace would have to get the data from the OEM, who would not be forthcoming or timely with the information. Finally, some subcontractors who invested corporate funds in developing items for defense systems were afraid that this proposal would give the prime contractors too

much bargaining power and permit them to force the subcontractors to license competitors.

These concerns were addressed in the revised proposal by making clear that the contractor would be obligated to develop and comply with a Spare Parts Acquisition Plan which was developed under the control of the government and was approved by the contracting officer. In addition, the revised proposal makes clear that the program manager would have to approve any parts or components which a contractor or subcontractor proposed for inclusion in a category for which reprourement technical data would not be provided. As to the fear that OEMs would not furnish technical data, the revised proposal makes this a contractual requirement. Indeed, the Panel perceives this as one of the advantages of this proposal because it ensures that small businesses will have accurate data on these parts. As to any potential problem concerning a prime contractor's bargaining power, the government would be able to challenge any recommendation that would limit competitive reprourement.

Taking into account both the controversial nature of technical data issues and the absence of any clear solution to the overall policy problems, the Panel presents this alternative approach as an option to be considered on a trial basis for further development and refinement and selective application during development of major systems or subsystems.

Technology Transfer

The Panel recommended changes to two of the major statutes that have been enacted to promote the transfer of technology from the government to the private sector.⁹⁰

The University, Small Business Patent Policy Act (Pub. L. No. 96-517) promotes technology transfer by permitting small businesses and non-profit organizations to retain title in inventions

⁹⁰See Chap. 5.2 of the report.

made in the performance of government contracts if they elect to file for a patent. The Panel's recommended changes to this Act focus on obtaining earlier disclosure of both the contractor's invention and his intention to file for a patent abroad. They would also give more time for agency review of an invention to protect the government's option to file if the contractor elects not to do so. A final change would help the contractor to file the patent application within one year of election. These changes should help to protect valuable commercial technology while also accelerating the entry of new technologies into the marketplace.

The Federal Technology Transfer Act (Pub. L. No. 99-502) directly promotes technology transfer by permitting federal laboratories to enter into cooperative research and development agreements (CRADAs) with private contractors. The Panel recommends two changes in this area:

- Allowing government laboratories to claim copyright protection in computer programs developed by their employees, similar to the protection employees receive on patents; and
- Allowing employees or former employees under certain conditions to assist in commercializing the technologies they have developed, even though they might be entitled to royalties for their invention.

In both cases, the changes should make it easier for technologies developed in the laboratories to find their way into the private sector.

Recommendations on the Competitiveness of U.S. Companies

The Panel reviewed three statutes affecting the competitive status of the United States in the world market: the Invention Secrecy Act; the Arms Export Control Act; and, the Freedom of Information Act (FOIA).⁹¹ While the Panel recognizes the significant amounts of informa-

tion (including at times information of value to contractors) released under FOIA requests, it believes the overall benefits of public disclosure of government activities outweigh any potential negative effects. Therefore, it recommended no changes to FOIA.

For the Invention Secrecy Act, the Panel proposed that a new committee be established, chaired by DOD, and including representatives of the Patent Office, the Export Control Administration, and the Department of State, to review needs for secrecy orders on patent applications. Such orders are placed where the grant of a patent has been determined to be detrimental to the national security. The new committee should see that the policy is applied more consistently and effectively.

The key change recommended by the Panel for the Arms Export Control Act is the deletion of the requirement that the government recoup nonrecurring costs when defense contractors sell major defense equipment through the Foreign Military Sales program. This recoupment requirement acts as a sales tax on U.S. goods, reducing the competitiveness of U.S. suppliers in world markets. The Panel's proposal is consistent with steps already taken by the Bush Administration to eliminate all recoupment fees required by regulation.

Recommendations on Government Use of Private Patents, Copyrights, and Trade Secrets

The authority contained in 28 U.S.C. § 1498 gives DOD necessary access to private technology by allowing contracting officers to authorize firms to use private patents on government contracts. Often this is coupled with an indemnity clause protecting the government from any liability should a patent owner decide to sue the government for infringement. The liability would then rest with the infringing contractor. The changes proposed by the Panel would modify the law to allow the owner to sue an infringing contractor

⁹¹ See Chap. 5.3 of the Report.

for damages directly, rather than having to sue the government.⁹² This change should reduce any unfair competitive advantage for an infringing contractor. A similar approach would be followed for purchases of commercial items.

STANDARDS OF CONDUCT

The Panel assembled and reviewed those statutes that directly or indirectly affect the defense acquisition process by imposing limitations upon the conduct of government employees, contractor representatives, or contractors.⁹³ This review included a sweep of topics extending far beyond the criminal provisions of Title 18, ranging from the fraud and bribery section of that title to statutory rulemaking powers. The Panel thus reviewed this area from the broadest possible perspective, looking not just at the role played by each law standing in isolation, but at their interrelationships and cumulative contributions to the sound conduct of defense procurement.

The majority of the statutes under consideration involved not just defense procurement, but also laws of more general application, prompting the Panel to be sensitive to their histories of amendment, enforcement, and judicial interpretation — and to the boundaries of its own charter. The laws governing criminal and civil fraud, for example, represent carefully adjusted balances of public and private interests. Many of them have Civil War antecedents, and if redrafted today would, in all likelihood, emerge in starkly different form and vocabulary. With rare exceptions, however, they remain current and serve well. During the course of its deliberations, the Panel progressively narrowed the initial scope of its study and ultimately focused on only a very limited number of issues that were, in its judgment, of sufficient concern to warrant recommendations to Congress.

False Claims and Qui Tam

The Panel reviewed the False Claims Act, 31 U.S.C. §§ 3729-3732 (FCA), and developed a number of issues on which there proved to be considerable Government and industry interest. Many centered on section 3730, under which *qui tam* suits are initiated by government employees or private citizens.⁹⁴ By amendments in 1986, Congress changed the standard of proof, increased penalties, and provided additional financial incentives for the filing of false claims suits by private parties. Those changes have resulted in significant numbers of new cases, sizable government recoveries, and questions as to whether in some respects the 1986 amendments may have overadjusted the law's balance of incentives and benefits.

On this topic the Panel sought views from industry, the Department of Justice, and agency personnel who participate in the government's review of cases when they are filed. The Panel members were unanimous in the belief that the *qui tam* provisions serve a valuable function. Most agreed as well that a principal weakness of those provisions was in their potential to be manipulated by industry and government employees seeking to maximize personal shares of recoveries. The Panel was sensitive to the fact that the statute was enacted to serve far beyond the limited confines of defense procurement, and for that reason it approached its review and resulting recommendations with particular deliberation.

The Panel recommended barring government employees from bringing *qui tam* suits on the basis of information acquired during the course of their government work. As interpreted in some federal courts, the law currently permits a government auditor, for example, to file a *qui tam* suit against a firm he is auditing, and to receive a substantial portion of the government's

⁹² See Chap. 5.4 of the Report.

⁹³ The Panel's consideration of standards of conduct is contained in Chap. 6 of its Report.

⁹⁴ See Chap. 6.3 of the Report.

eventual recovery. Because situations such as that bear the potential for abuse and for inescapable conflicts of interest, the Panel suggests forbidding suits that rely upon information obtained during the course of the employee's official duties.

The Panel also suggests a change to balance the competing interests of government, industry and *qui tam* plaintiffs in cases involving voluntary disclosures. It recommends that there be no right to sue if the *qui tam* plaintiff learned of the grounds for the suit from information conveyed to the government as part of a voluntary disclosure program. The Panel makes an analogous recommendation that would forbid suits based upon information generated from a government audit or investigation.

The Panel further suggests that provision be made to permit the court to adjust recoveries awarded to *qui tam* plaintiffs who played a role in the fraud, or were deliberately slow to report it. The Panel considered, but on the strength of experience to date did not adopt, suggestions for creating additional procedural protections against frivolous *qui tam* suits, or for imposing a fixed dollar ceiling on plaintiffs' recoveries.

The Panel's recommendations also address the potential under the FCA for the imposition of unreasonably excessive penalties. The mathematical calculations prescribed by the FCA hold the prospect, especially if applied rigidly to each occurrence in a production run, of multiplying the effect of a single underlying false record or report into damages well in excess of the government's actual harm. For the contractor, this same multiplier effect could potentially involve damages of ruinous proportions. To lessen this concern, which was cited by many as a disincentive to becoming a government contractor, the Panel recommends an amendment authorizing the court to adjust FCA penalties whenever it finds they are disproportionate to the actual damages suffered by the government.

Contract Disputes When Fraud Is Alleged

The Panel received comments addressing a number of perceived conflicts between the efficient

resolution of contract disputes and the contemporaneous resolution of fraud issues relating to the same contract or dispute. Industry representatives pointed out that allegations of fraud questions can cause long delays and introduce uncertainty into the disputes process, whereas the government understandably attaches high priority to the opportunity to perform a thorough investigation into suspected wrongdoing.

One factor long at the root of this conflict is the lack of a single forum that can resolve both contract claims and related fraud claims. The jurisdictional allocation today vests contract disputes resolution in the Court of Federal Claims (CFC) and boards of contract appeals, places civil and criminal fraud cases in the district courts, and gives the CFC jurisdiction over government fraud counterclaims asserted against contractor claims. There is also a natural tension present in such cases among the rights and interests of the parties. The question, then, is one of striking the appropriate balance.

Following its review, the Panel arrived at three proposed adjustments. First, to clarify what is often a threshold issue of board jurisdiction, the Panel recommends amending the Contract Disputes Act (CDA) to clarify that the process for obtaining or bypassing the contracting officer's final decision is available even in cases when fraud is suspected. Then, to facilitate resolving contractor claims and related government assertions of fraud in a single forum, the Panel proposes two additional amendments to the CDA: first, it recommends giving boards the authority to transfer a pending appeal to the claims court when fraud is at issue, and second, it recommends amending the exclusive jurisdiction of the boards to permit trial of a board matter as a counterclaim in a district court fraud action that has been brought by the government.

Ethics Laws

The Panel also reviewed the array of ethics laws affecting those engaged in defense procurement, both on behalf of government and indus-

try.⁹⁵ A relatively small group of statutory restrictions governed this topic from the Civil War until quite recently, when the defense buildup of the 1980s was punctuated by a number of events that drew extensive public attention. These disclosures included the pricing of military diodes, ashtrays, and hammers as well as revelations of corporate dog-boarding at government expense. Concerns also arose about situations in which employees or officials left the government to work for contractors, raising questions concerning the protection of procurement information. The "Ill Wind" prosecutions raised new questions about the sufficiency of the laws and prompted additional legislation. Addressing related issues in slightly different terms, most of those provisions were concerned with the potential for conflicts of interest, or "appearances" of conflicts. The additional assurance they contributed towards public trust in Pentagon spending during the 1980s was judged at the time to merit whatever additional costs they added and the bookkeeping they required.

In what is now a different decade and a different procurement environment, the Panel believes it may be time to reassess the contribution of some of those provisions. The Panel analyzed six legal restrictions and one comprehensive regulation, all of which potentially govern the receipt of a gift by a defense employee engaged in procurement: the bribery statute at 18 U.S.C. § 201(b); the criminal gratuities statute at 18 U.S.C. § 201(c); the gift provisions of the procurement integrity amendments to the Office of Federal Procurement Policy Act at 41 U.S.C. §§ 423(a)(2) and (b)(2); the supplementation of salary statute at 18 U.S.C. § 209; the civil gratuities statute at 10 U.S.C. § 2207; the recently enacted gift statute at 5 U.S.C. § 7353; and the new executive branch standards of conduct regulations promulgated by the Office of Government Ethics (OGE) at 5 C.F.R. § 2635.

The Panel concluded that the new OGE regulations satisfy a long-standing need by imposing an enforceable and uniform rule on all executive branch employees, and that the special gift provisions at 41 U.S.C. §§ 423(a)(2) and (b)(2) are now essentially redundant and ought to be repealed to prevent potentially confusing overlap with the new uniform rules.

The Panel's review of the restrictions imposed upon an employee's outside employment discussions by 18 U.S.C. § 208(a), 10 U.S.C. § 2397a, and 41 U.S.C. §§ 423 (a)(1), (b)(1), and (c) suggests that the latter provisions were enacted primarily to correct technical shortcomings in the basic government-wide law, 18 U.S.C. § 208(a). The Panel believes those deficiencies are today even more comprehensively addressed by OGE at 5 C.F.R. § 2635. For that reason, the Panel recommends repeal of those two provisions to avoid confusing inconsistencies among their differing procedural requirements for recusal and disqualification.

Other Integrity Issues

"Revolving door" laws were also analyzed, including the military criminal selling statute at 18 U.S.C. § 281; the military-civil selling statute at 37 U.S.C. § 801; the post-employment and reporting provisions of 10 U.S.C. §§ 2397, 2397b, and 2397c; and the post-employment portion of the procurement integrity amendments to the OFPP Act at 41 U.S.C. § 423(f).⁹⁶ The Panel recommends that all of those provisions be repealed. The two antiquated military statutes largely duplicate provisions of 18 U.S.C. § 207, and the others have proven to exact an enormous enforcement burden to regulate a very limited number of persons. Within the large family of revolving door laws, the chief independent contribution of the post-employment restrictions of 10 U.S.C. § 2397b and 41 U.S.C. § 423(f) is to prevent key employees and officials

⁹⁵See Chap. 6.4 of the Report.

⁹⁶See Chap. 6.7 of the Report.

from switching sides in situations that might disadvantage the government through their behind-the-scenes assistance to a contractor. As an alternative, the Panel suggests a new subsection that could be added to the main body of government post-employment laws at 18 U.S.C. § 207.

The Panel reviewed those provisions of law protecting sensitive procurement information, including the Trade Secrets Act at 18 U.S.C. § 1905 and the information protection provisions of the procurement integrity amendments to the OFPP Act at 41 U.S.C. §§ 423(a)(3), (b)(3), and (d). The Panel concluded that the information protection provisions of section 423 fill a necessary and useful role in protecting bid and evaluation data during the procurement process, but that they suffer in clarity from having been drafted to fit the other definitions and objectives of the OFPP amendments. The Panel believes that the current protections could be better executed through enactment of a comprehensive, single-purpose law, a draft of which is offered as an alternative.

The Panel reviewed a number of miscellaneous provisions of law, two of which, although they relate only indirectly to defense procurement, are recommended for repeal. The most important of those is the Byrd Amendment at 31 U.S.C. § 1352, which forbids recipients of federal grants and contracts from using appropriated funds to lobby for the award of contracts. The same substantive requirements exist elsewhere, and the Panel urges Congress, in its next review of this subject, to relieve DOD of the unproductive record-keeping requirements imposed by this provision. It similarly recommends the repeal of 10 U.S.C. § 2408 regarding the debarment of persons convicted of felonies. The worthy objectives of the latter provision have become mired in administrative paperwork and could be better achieved through reliance on the established suspension and debarment process. Finally, the Panel recommends a "housekeeping action" that would promptly reactivate the suspended whistle-blower protection provision at 10 U.S.C. § 2409 to avoid a lapse in coverage.

VII

OTHER STATUTES

Virtually all of the statutes covered in the preceding sections of this summary have a direct impact upon the buyer-seller relationship. The Panel's recommendations for repealing, amending, or consolidating those statutes will have a similarly direct benefit upon those in government who administer the DOD acquisition system as well as those in industry who respond to its requirements. However, the Panel also reviewed several other groups of laws which have a less direct impact upon the buyer-seller relationship but which nevertheless play important roles in the defense acquisition system. In this section the Panel presents its recommendations on a number of those important statutory groupings. They include:

- Major Systems Statutes
- Testing Statutes
- Service Specific Laws
- Fiscal Statutes
- Fuel and Energy-Related Laws.

Finally, this section includes a summary of the Panel's position on the Brooks Act and the Warner Amendment, the fundamental authority for the procurement of automatic data processing equipment.

Major Systems Statutes

Chapter 144 of Title 10, U.S. Code contains laws which govern major defense acquisition programs. The Panel concluded that these statutory requirements were excessively detailed, in some

cases duplicative and in others inconsistent with the reality of reduced defense budgets.⁹⁷ While recognizing the continued necessity of reports to the Congress, the Panel recommends removing the excessive detail from 10 U.S.C. § 2432, Selected Acquisition Reports, but retaining the broad policy that such reports be submitted. In view of concerns that program managers were inundated with various reporting requirements in differing formats and calling for differing data, the Panel recommends a unified reporting format for all users, including the Congress, in the format which DOD uses to manage its operations. This unified format would greatly reduce the burden on program managers and eliminate the periodic necessity for amendment of the statute to more closely follow DOD practices. The Panel also recommends folding the Unit Cost Report requirement of 10 U.S.C. § 2433 into § 2432.

Other recommendations concerning Chapter 144 are to streamline 10 U.S.C. §§ 2434 and 2435 dealing with independent cost estimates, manpower estimates and baseline requirements by eliminating statutory detail but retaining existing policy. The Panel recommends that the legislation governing Defense Enterprise Programs (DEPs), 10 U.S.C. §§ 2436-37, be repealed. DEPs have not been successfully implemented by DOD or supported by Congress. The Panel also recommends repeal of statutory requirements for competitive prototyping and competitive alternative sources, 10 U.S.C. §§ 2438-39. The Panel believes that mandating such

⁹⁷ See Chap. 3.1 of the Report.

strategies is inappropriate in today's reduced budget environment and may be unaffordable. However, the Panel recommends retaining the major defense acquisition pilot program because it has not yet been implemented and some experience with the program is warranted.

Testing Statutes

The Panel reviewed various statutes within Title 10 of the U.S. Code that establish requirements regarding testing of major weapon systems and munitions programs by DOD.⁹⁸ Under the current statutory scheme, all major defense systems, as defined under 10 U.S.C. § 2302(5), must undergo operational test and evaluation before those systems may proceed beyond low-rate initial production. For major defense systems under section 2430 of Title 10, that testing must be set forth in a plan that has been approved by the Director of Operational Test and Evaluation of DOD, who must then evaluate the results of that testing and report on it to the congressional defense committees before low-rate initial production may be exceeded. No system-contractor employees may be involved in this testing unless such employees will also be involved in system deployment. Further, support contractors may not assist operational testing if they have previously been involved in system development, production, or developmental testing unless their impartiality has been assured in writing by the Director of Operational Test and Evaluation or the contractor functioned solely as a representative of the federal government. With regard to live-fire testing, major defense acquisition programs with user-protection features and major munitions programs may not proceed beyond low-rate initial production until combat-relevant survivability or lethality testing has been completed. This requirement may be waived by the Secretary of Defense if unreasonably expensive or impracticable and if an alternative is available. A specific requirement for such testing exists for wheeled or tracked vehicles.

Congress rightly is concerned about past abuses where the DOD inappropriately rushed to pro-

duction without adequate testing. It appropriately gives a high priority to its testing requirements. The testing community is also ever vigilant and protective of its statutory mandates. The program executive officers and program managers, on the other hand, in some cases express frustration over the delays and expense imposed on their programs by overzealous testers. Thus, testing is a contentious subject with strong advocates in each camp.

The Panel concluded that a consolidation of the four current testing statutes and elimination of statutory detail would further its statutory streamlining mandate and allow the flexibility desired by the testing and acquisition communities. The Panel developed a dual proposal in the testing area. Initially, the Panel recommends the repeal of the four testing statutes within Title 10 in their entirety and the enactment of a streamlined testing statute. This streamlined statute sets forth the basic rule that both vulnerability/lethality and operational testing must occur before proceeding beyond low-rate initial production. The proposed statute adopts extant definitions of those terms. The statute then vests discretion in the Secretary of Defense to implement the required testing. Broad guidelines in specific areas — such as contractor involvement and authority to modify operational testing requirements — are provided. These guidelines state general principles, but specific implementation of the rule is left to the Secretary of Defense.

The Panel recognized, however, that in view of the sensitivity and concern in the Congress for adequate testing, there may be reluctance to fully adopt such a streamlined approach. Accordingly, *at a minimum*, the Panel recommends the Congress adopt certain specific statutory amendments that are set forth in the analysis of each individual statute within this subchapter.

Specifically, the Panel recommends repeal of 10 U.S.C. § 2362 as subsumed by the requirements of 10 U.S.C. § 2366. With regard to the live-fire requirements of section 2366, the Panel recommends substitution of the phrase "vulnerabil-

⁹⁸See Chap. 3.2 of the Report.

ity" for "survivability" throughout the statute. The former term more accurately reflects the type of testing mandated by the law. The Panel also recommends elimination of the requirement for "full-up" vulnerability testing. As a mandatory requirement, that testing can add considerable time and expense in certain high-value systems.

Recommended amendments to the operational test and evaluation (OT&E) requirements of 10 U.S.C. § 2399 include authority to modify dedicated OT&E requirements for certain types of programs and amendments to permit greater system and support contractor involvement in OT&E under controls to be specified by the Secretary of Defense. Finally, the Panel recommends that 10 U.S.C. § 2400 be amended to add strategic defense missiles as a low density production base item, and to make the Test and Evaluation Master Plan discretionary for low-density items.

Service-Specific Laws

The Panel examined the Service-specific acquisition sections in the last three subtitles of Title 10.⁹⁹ These laws fall into two main groups: (1) the Army/Air Force statutes, that evolved historically out of the same-source law, and (2) Navy-peculiar laws. These laws provide various authorities to a Secretary of an individual military department and are grouped in that Service's chapter of Title 10. These provisions are of such a disparate nature that summarizing them is not warranted.

In instances where a grant of authority is no longer used, or otherwise obsolete, the Panel recommends repeal. In a number of cases, efforts were made to modernize still-meaningful authorities and to consolidate sections that so lend themselves into a single, streamlined section. For example, the authorities at 10 U.S.C. §§ 7361 through 7367 all cover naval salvage opera-

tions and all were enacted by the same law. These sections were consolidated, and the language modernized where appropriate. Other examples are as follows :

- The Service-specific authorities to contract for architect-engineering services (10 U.S.C. §§ 4540, 9540 and 7212) are recommended for repeal as laws that have clearly outlived their usefulness; the collective analysis for these statutes discusses the problems raised by the 6 percent fee limit in these laws and their interplay with the Brooks architect-engineering statute.
- The laws at 10 U.S.C. §§ 4506/9506, 4507/9507 and 4508, all involving authority to sell or loan a government item or service, were crafted into a single statute that sets forth specified authorities to sell or loan government material for prescribed purposes. It includes important authority to permit sales or the use of government test facility services by private contractors at specified rates.
- Civil Reserve Air Fleet (CRAF) enhancement authorities at 10 U.S.C. §§ 9512 and 9513 were recommended for amendment to permit private contractors limited commercial use of military airfields. This proposal was based on the crucial role played by CRAF during Operations Desert Storm/Desert Shield.

The Panel notes that those Service-specific authorities that are marked for retention might appropriately be collected into a "Service Procurement Generally" chapter.

Fiscal Statutes

The Panel considered numerous statutes, primarily located within Chapter 131 of Title 10, that relate to DOD fiscal authority and budgetary procedures.¹⁰⁰ Of these statutes, those that dealt with exemptions for various DOD

⁹⁹ See Chap. 3.3 of the Report.

¹⁰⁰ See Chap. 3.8 of the Report.

expenditures from anti-deficiency requirements were deemed directly related to DOD acquisition and recommended for retention. The consensus of the Panel was that a number of the other fiscal and budgetary Title 10 statutes were not directly related to the DOD acquisition process and hence were outside the scope of the Panel's charter. The Panel formally recommended no action for each of these laws, but notes certain dispositions that the Congress may wish to consider. The Panel did, however, recommend an amendment to the "M" account provisions at 31 U.S.C. § 1552(a) to exempt from the five-year cancellation of funds rule sufficient funds to complete unfinished work on existing contracts and to pay close-out costs and contract claims.

Fuel and Energy-Related Laws

The Panel considered statutory provisions that relate to fuel or energy system procurement by DOD.¹⁰¹ These provisions are not currently organized or grouped within Title 10 on that basis. Some of those sections dealt directly with fuel and petroleum acquisition. For example, the Panel recommends amending the authority to waive contract procedures at 10 U.S.C. § 2404 to add authority to sell excess petroleum stores and credit those proceeds to applicable appropriations. The Panel also recommended a modification in authority to contract for storage of fuels and management of tank farms to accommodate management-only contracts. Other sections were essentially policy-related enactments, mandating environmentally sound acquisition practices by the DOD. In the absence of any significant burden on acquisition practices, these sections were recommended for retention. Sec-

tions 2481, 2483, and 2490 granted authority to sell excess utility services. These sections were also recommended for retention. Finally, the Panel recommends that this body of law should be collected within Title 10 into a single chapter dealing exclusively with fuel and energy-related acquisition.

The Brooks Act and the Warner Amendment

Under the Brooks Act, the acquisition of ADPE by the federal executive agencies is centralized under the General Services Administration (GSA). That agency retains exclusive authority to procure ADPE. While GSA delegates that authority, to varying degrees, to the individual agencies, it still retains extensive managerial oversight of this acquisition process. Under the Warner Amendment, DOD is authorized to purchase directly certain, delineated types of ADPE related to military and intelligence missions. In the exercise of that authority, and in conducting individual procurements when delegated authority by the GSA, the DOD components have developed their own, internal mechanisms for ADPE procurement. The two primary recommendations considered by the Panel were (1) to amend the Warner Amendment to wholly exempt DOD from the Brooks Act and with it from GSA oversight, or (2) to significantly increase the blanket delegation of procurement authority for DOD. The Panel deliberated extensively over this question, but was unable to achieve a consensus among its members as to a formal, legislative recommendation in this area. At a minimum, however, the Panel agreed that the blanket delegation of procurement authority to DOD should be raised significantly.¹⁰²

¹⁰¹ See Chap. 3.7 of the Report.

¹⁰² See Chap. 3.4 of the Report.

VIII

CONCLUSIONS

Congress will ultimately decide how well the Panel's recommendations met its declared objectives as well as the goals suggested by its original mandate. However, in assessing those results, both Congress and the general public should be aware of the constraints which affected the Panel's work.

The key constraint was time, especially when measured against the magnitude of the task. The 16 months between the convening of the Panel and the printing of its Report obviously constrained the process of considering the 889 statutes comprising the universe of acquisition laws — a number so high that it surprised even veteran observers of these matters. While an extension of the statutory deadline of January 15, 1993, could have been justified, the Panel members strongly believed that it was more important to place their recommendations squarely on the agenda of a new Administration and a new Congress. Inevitably, priorities were set in order to bring the greatest analytical attention to the most obvious and best understood problems, especially in those areas that offered the greatest prospects for improvement. In addition to focusing on the most relevant acquisition laws, the Panel necessarily excluded regulations, executive orders, and most case law from the study. However, the most significant effects imposed by the time constraint may have come when the Panel chose to recommend a law's retention or to exclude it from more detailed consideration, either because the evidence for change was ambiguous or because it was impossible to obtain additional data without the expenditure of far greater resources than the Panel had at its disposal. The Panel is, therefore, recommending the retention of more laws

than might otherwise have been identified for amendment or repeal. It is important to note that these recommendations are made on the basis of the "best evidence" available to the Panel at the time of its decision.

The second constraint reflects a general concern about the numbers of laws considered during this review, as well as their placement within the U.S. Code. Many of the statutes affecting defense procurement arise from titles of the Code beyond Title 10, often reflecting the divergent interests of many different congressional committees and subcommittees. The organization of the Code also reflects multiple functions which may apply in different ways to different agencies of the government. The recognition of those realities affected one of the Panel's original goals, which was to "prepare a proposed code of relevant acquisition laws." Early in its deliberations, the Panel decided that this goal did not imply the creation of an all-encompassing "model code" for DOD procurement to be located at a single point within the body of Title 10 — primarily because the administrative tidiness of such a compilation would be less helpful than the jurisdictional questions that would inevitably be raised. Equally important was the need to assemble and review the array of procurement laws before creating a "model code" in Title 10 or anywhere else. Consequently, while it has recommended the consolidation of certain laws and chapters in several of the areas noted above, the statutes which the Panel has assembled, reviewed, and presented in its Report represent its best judgments on the core functions of the defense procurement process. Should those recommendations be enacted, therefore, a new code of relevant acquisition laws will have been created.

The specific nature of these recommendations — for the repeal, amendment, or deletion of almost 300 laws and the consolidation of many others — clearly distinguishes the work of this Panel from many others which have examined the problem of defense acquisition. While sweeping legislative changes have been advocated before, previous efforts have stopped well short of specifying the precise proposals for individual statutory change presented in the Panel's Report. There are, however, two major problems associated with this level of detail. The first is maintaining an appropriate focus for change. Even though there may be some disagreement or even controversy with particular changes recommended by the Report, it is vital that the Panel's effort be seen as a "system solution". The second problem is time — maintaining the focus for change over the many months or years which will be needed to carry out such an ambitious agenda. While some of the Panel's recommendations can easily be enacted, many others will require hearings, debate, and careful study. There can be no question, however, that the continuation of such legislative initiatives, as well as further regulatory improvements, must proceed as a legislative-executive branch partnership with the common goal of a streamlined acquisition system.

There can be no doubt, however, that this goal will require particularly strong leadership and teamwork by Congress. A recent study by the Business Executives for National Security, for example, is merely the latest to note that no fewer than 107 congressional committees and subcommittees exercise some degree of Pentagon oversight: "The result is massive jurisdictional confusion."¹⁰³ But without better coordination, defense procurement law will remain complex, confused, and often chaotic. The evidence accumulated during this review also suggests that an ancillary result of jurisdictional

confusion is the proliferation of laws which can impose burdensome and often conflicting requirements. While the Panel is particularly appreciative of the strong congressional support for its efforts, it respectfully suggests that the enactment of the reforms recommended here will not achieve a lasting effect unless Congress also gives continued attention to its responsibility for maintaining a disciplined and coherent legal structure.

The final point of this summary may not be so much a constraint as a caveat. The work of the Panel represents its best efforts to provide a common baseline for those who seek to improve defense acquisition laws as well as the policies which implement them. In each of the areas they reviewed, however, the Panel members were struck by the magnitude of the task which future reformers will face in making comprehensive legislative changes. There is also no question that these recommendations are best thought of as a "first cut" at a large problem, and certainly not as an ideal solution to it. Moreover, the Panel recognizes the importance of seeking government-wide consistency in procurement matters and hopes that its recommendations can serve as the baseline for parallel changes in the legislative underpinnings of civilian agency acquisition. While these findings do not fully achieve the Packard Commission's ultimate goal of providing a "single, consistent, and greatly simplified procurement statute,"¹⁰⁴ they clearly carry out the will of Congress by translating those general principles into a "pragmatic, workable set of recommended changes to the acquisition laws."¹⁰⁵ It is therefore our sincere hope that the changes recommended by the Panel will make a substantial and lasting contribution to the development of a more efficient defense procurement system, one that is capable of meeting any future challenge to American national security.

¹⁰³ Business Executives for National Security, Washington, D.C. *Report of the Commission on Fundamental Defense Management Reform*, 36 (1992).

¹⁰⁴ See note 3, p. 2 of this summary.

¹⁰⁵ See note 6, p. 2 of this summary.

APPENDIX:

**TABLE I.
RECOMMENDATIONS FOR AMENDMENT OR REPEAL OF STATUTORY PROVISIONS**

(Summarized by Chapter Reference to the Panel's Report)

Chapter 1 Contract Formation

10 U.S.C. § 2301	Congressional defense procurement policy	<p>Amend section to incorporate Panel objectives with existing congressional defense procurement policy. The following are appropriately melded within the statute:</p> <p>Enhance science and technology, research and development and production capability; provide for continued development and preservation of an efficient and responsive defense industrial base; and ensure the financial and ethical integrity of defense procurement programs consistent with achieving an optimum balance among efficient processes, full and open access to the procurement system and sound implementation of socioeconomic policies.</p> <p>Clear policy for preference of commercial and nondevelopmental items.</p> <p>Appropriate risk allocation.</p> <p>Investment in "flexible manufacturing processes" and "dual-use" technologies.</p> <p>Fair and expeditious processing of protests and disputes.</p> <p>Clarify the intent of Congress to state requirements in terms of functions to be performed, performance required, or essential physical characteristics.</p> <p>Provide specific guidance in encouraging contracting officer discretion to exercise sound judgment in purchasing commercial items.</p>
10 U.S.C. § 2302	Definitions	<p>Add definition of commercial item (both as end-items and as components) which includes manufactured products, ancillary services, new products, modified products, combinations of products, products sold in small quantities to the general public, and items produced from commercial processes.</p> <p>Change the term "small purchase threshold" to "simplified acquisition threshold" with a threshold of \$100,000. Also, add language concerning "contingency operation" with a threshold of \$200,000 for purchases to be made outside the United States.</p> <p>Incorporate and amend definition of nondevelopmental item for clarity and simplicity.</p>
10 U.S.C. § 2304	Contracts: competition requirements	<p>Change references from "small purchase threshold" to "simplified acquisition threshold."</p> <p>Amend section to exempt contractors supplying commercial items from specifying the incurred overhead or the value added by the contractor to the item.</p> <p>Amend by deleting subsection (j) covering master agreements and substituting language that prescribes requirements for contracts that do not procure or specify a firm quantity of supplies or services and provide for obtaining supplies or services by issuance of delivery orders or task orders.</p>

10 U.S.C. § 2305	Competition: planning, solicitation, evaluation, and award	Amend to require regulations which address the debriefing of unsuccessful offerors. Amend to grant the head of an agency the authority to take certain remedial action if an award or proposed award does not comply with a statute or regulation, such as the ability to pay bid and proposal costs and legal fees for meritorious protests.
10 U.S.C. § 2306	Kinds of contracts	Amend by deleting subsection (c) which requires approval by the head of an agency before use of a cost-reimbursement or incentive contract is allowed.
10 U.S.C. § 2317	Encouragement of competition and cost savings	Repeal.
10 U.S.C. § 2318	Advocates for competition	Delete subsection (c) which requires each advocate for competition to transmit to the SECDEF a report describing his activities in the preceding year. Reporting requirements are already set by regulations within the agencies.
10 U.S.C. § 2325	Preference for nondevelopmental items	Amend the section by changing the title to "Commercial and nondevelopmental items: product descriptions" and ensure product descriptions promote the use of both commercial and nondevelopmental items. Move NDI definition to 10 U.S.C. § 2302.
40 U.S.C. §§ 541-544	Brooks Architect-Engineers Act	Amend section 541 to remove ambiguity as to the breadth of services covered by the Act.
41 U.S.C. § 416	Procurement Notice	Amend to harmonize DOD and civilian agency thresholds, allow the use of automated systems for actions under the simplified acquisition threshold, generally require automated means for transmitting solicitation and award notices for publication and increase flexibility when setting deadlines for submission of offers for commercial items.
10 U.S.C. § 2306a	Truth in Negotiations Act	Amend to maintain the dollar threshold for application of the statute at \$500,000 rather than the lower standard of \$100,000 scheduled to become effective in 1996. Amend to allow for exemption of modifications to commercial items contracts in excess of the threshold from the application of TINA where the contracting officer can determine price reasonableness. Amend to expand and clarify the exception for adequate price competition to provide more discretion to the contracting officer to use market research to determine price reasonableness.
10 U.S.C. § 2356	Contracts: delegations	Amend the section to provide for decision-making at a lower level, contributing to streamlining and efficiency.
10 U.S.C. § 2358	Research projects	Amend to provide that advanced as well as basic and applied research is included in the scope of authority granted to both the SECDEF and the Secretaries of the military departments. Amend to provide that cooperative agreements can be used for all types of research efforts including basic and applied research. Expand authority of section to include coverage for research projects which are "otherwise of interest to DOD or the military departments."
10 U.S.C. § 2364	Coordination and communication of defense research activities	Amend by changing the language to ensure that information is provided in a timely manner by replacing the references to, and definitions of, the Milestones 0, I, and II decisions with "acquisition program decisions."
10 U.S.C. § 2371	Advanced research projects: cooperative agreements and other transactions	Amend the section so that it contains only statutory provisions dealing with the utilization of cooperative agreements and other transactions.
10 U.S.C. § 4503	Research and development programs	Repeal as duplicative of authority as amended in 10 U.S.C. § 2358.
10 U.S.C. § 7522	Contracts for research	Amend by repealing subsection (b) which deals with payments of research and development contracts and merge into revised 10 U.S.C. § 2307.
10 U.S.C. § 9503	Research and development programs	Repeal as duplicative of authority which exists in 10 U.S.C. § 2358.

31 U.S.C. § 3553	Review of protests; effect on contracts pending decision	Amend to alleviate confusion in the use of working days and calendar days by consistently using calendar days. Amend subsection which requires suspension of contract performance when a protest is filed within 10 days of contract award should be modified to also require an agency to suspend contract performance if a protest is filed within 3 calendar days after the date set by an agency for any requested and required debriefing. Amend to provide statutory authority for the Comptroller General to issue protective orders.
31 U.S.C. § 3554	Decisions on protests	Amend to expand express option for consideration of GAO protest from 45 to 65 calendar days. Amend to require to maximum extent that protest amendments adding new grounds be resolved in the same time as for original protest. Amend to make parties found responsible for protests which are frivolous or not brought or pursued in good faith liable to the government for its cost of defending the protest.
31 U.S.C. § 3555	Regulation; Authority of Comptroller General to verify assertions	Amend section to prescribe regulations to support Panel's recommendations made in Title 31.
31 U.S.C. § 3556	Nonexclusivity of remedies; matters included in agency record	Delete reference to district court in accordance with the Panel's recommendation to discontinue the <i>Scanwell</i> jurisdiction of district courts in bid protest matters.
28 U.S.C. § 1491	Claims against the United States generally; actions involving the Tennessee Valley Authority	Amend to add a section entitled "Bid Protest" which would give the U.S. Court of Federal Claims exclusive judicial jurisdiction of pre-award and post-award bid protests. This provision would require the court to set aside agency action upon a finding of violation of statute or regulation and to award costs, attorney fees, expert witness fees and bid and proposal expenses.
40 U.S.C. § 759	The Brooks Act; procurement, maintenance, operations, and utilization of automatic data processing equipment	Amend to maintain consistency with recommendations made to GAO protest procedures. Establish consistent use of the term "calendar days." Require an agency to suspend contract performance if a protest is filed within 3 calendar days after the date set by an agency for any requested and required debriefing. Amend to require that new grounds of protest should be resolved where possible within the same time period established for resolution of initial protest. Amend to allow for electronic filing and dissemination of protest documents. Amend to require party responsible for a frivolous protest or a protest which has not been pursued in good faith to pay defense costs to the government. Amend to allow payment of expert witness and consultant fees.
10 U.S.C. §§ 2308 and 2311	Assignment and delegation of procurement functions and responsibilities Delegations	Repeal section 2308 and move to section 2311.
10 U.S.C. § 2310	Determinations and decisions	Amend to allow determinations and decisions for a class of purchases or contract: except where expressly prohibited under Title 10.
10 U.S.C. § 2326	Undefinitized contractual actions: restrictions	Amend to clarify that limitations are on obligations rather than on expenditures. Amend to allow waiver of the percentage limitations during contingency operations or other national emergencies.
10 U.S.C. § 2329	Production special tooling and production special test equipment: contract terms and conditions	Repeal.
10 U.S.C. § 2331	Contracts for professional and technical services	Amend by moving subsection (c) to 10 U.S.C. § 2304.
10 U.S.C. § 2381	Contracts: regulations for bids	Amend by clarifying who may prescribe regulations.
10 U.S.C. § 2384	Supplies: identification of supplier and sources	Amend section to exempt contractors who supply commercial items from supplier and source identification requirements.

Pub. L. No. 101-189 § 821	Requirement for certificate of independent price determination in certain department of defense contract solicitations	Repeal.
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Chapter 2 Contract Administration

Contract Payment

10 U.S.C. § 2307	Advance payments	Rename the section "Contract financing." Merge the substance of three other statutes concerned with advance, progress and special payments into it.
31 U.S.C. §§ 3901-3907	Prompt payment	Amend section 3904 to extend the discount period to the latter of the receipt of the invoice or the receipt of goods and services.
10 U.S.C. § 2324	Allowable costs under defense contracts	Amend the section to include a statement defining allowable cost and to retain only the penalty scheme as amended by the 1993 Defense Authorization Act, the burden of proof, the evaluation by the Comptroller General, and the definition of "covered contract."
10 U.S.C. § 2382	Contract profit controls during emergency periods	Repeal.
41 U.S.C. § 420	Travel expenses of government contractors	Repeal.

Audit and Access to Records

5 U.S.C. App. 3 §§ 1-12	Inspector General Act	Amend section 9 to repeal the transfer of auditing and investigating authority to the Office of the Inspector General.
10 U.S.C. § 2313	Examination of books and records of contractor	Amend to combine this section and section 2306a(f) and certain regulatory provisions into a single comprehensive audit statute.
10 U.S.C. § 2406	Availability of cost and pricing records	Repeal.

Cost Accounting Standards

10 U.S.C. § 2410b	Contractor inventory accounting systems: standards	Repeal.
41 U.S.C. § 422	Cost-accounting standards board	Recommend CAS Board under its present authority take prompt action to facilitate DOD purchases of commercial items.

Price, Delivery, and Product Quality

10 U.S.C. § 2383	Procurement of critical aircraft and ship spare parts: quality control	Repeal.
10 U.S.C. § 2403	Major weapon systems: contractor guarantees	Repeal.
10 U.S.C. § 4534	Subsistence supplies; contract stipulations; place of delivery on inspection	Repeal.
10 U.S.C. § 9534	Subsistence supplies; contract stipulations; place of delivery on inspection	Repeal.
41 U.S.C. § 15	Transfers of contracts; assignment of claims; set-off against assignee	Amend to delete provision which prohibits set-off against assignees only during times of war or national emergency.
41 U.S.C. § 20	Deposit of contracts	Repeal.
41 U.S.C. § 417	Record requirements	Amend to conform to simplified acquisition threshold.

Claims and Disputes

10 U.S.C. § 2405	Limitation on adjustment of shipbuilding contracts	Amend section to remove the specific requirement therein pertaining to the Contract Disputes Act certification.
10 U.S.C. § 2410	Contract claims: certification	Repeal.
28 U.S.C. § 1346	United States as a defendant	Amend to clarify that this section does not pertain to any action or claim which relates to a contract subject to the Contract Disputes Act.
41 U.S.C. §§ 601-613	Contract Disputes Act	Amend to reduce the time for appeals to the Court of Federal Claims from one year to 90 days. Amend to raise the threshold amounts from \$50,000 to \$100,000 and to incorporate Congress' recent amendments regarding certification. Amend to include a six-year statute of limitation for the filing of contract claims by and against the United States. Amend to raise the "small claims" maximum amount to \$25,000.

Extraordinary Contractual Relief

50 U.S.C. §§ 1431-1435 (Pub. L. 85-804)	Extraordinary Contractual Relief	Repeal section 1435 to permit use of authority contained in this statute at all times rather than only in times of national emergency.
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Chapter 3 Service-Specific and Major Systems Statutes

Major Systems Statutes

10 U.S.C. § 2432	Selected Acquisition Reports	Amend to remove detail and to incorporate Unit Cost Report requirement currently in 10 U.S.C. § 2433.
10 U.S.C. § 2433	Unit Cost Reports	Repeal and incorporate Unit Cost Report requirement into 10 U.S.C. § 2432.
10 U.S.C. § 2434	Independent cost estimates, operational manpower requirements	Amend to delete manpower and independent cost estimate report content and definition of manpower estimates to recast as policy guidance.
10 U.S.C. § 2435	Enhanced program stability	Amend to delete baseline description and review procedures.
10 U.S.C. §§ 2436 -2437	Defense Enterprise Programs: milestone authorization	Repeal.
10 U.S.C. § 2438	Major Programs: competitive prototyping	Repeal.
10 U.S.C. § 2439 (formerly § 2438)	Major Programs: competitive alternative sources	Repeal.
Pub. L. 101-510 § 809	Major Defense Acquisition Pilot Program	Amend to reflect proposed repeal of section 2436.

Testing Statutes

10 U.S.C. § 2362	Testing requirements: wheeled or tracked vehicles	Repeal.
10 U.S.C. § 2366	Major Systems and munitions programs; survivability and lethality testing required before full-scale production	Repeal and enact a more streamlined statute. In the alternative, amend to: eliminate full-up testing requirement; extend waiver authority; and substitute the term "vulnerability" for the term "survivability."
10 U.S.C. § 2399	Operational test and evaluation of defense acquisition programs	Repeal and enact a more streamlined statute. In the alternative, amend to: permit modification of mandatory operational testing requirement; permit greater contractor involvement in operational testing, logistical, and other support functions; permit greater support and nonsystem contractor involvement in operational testing.

10 U.S.C. § 2400	Low-rate initial production of new systems	Repeal and enact a more streamlined statute. In the alternative, amend to add coverage of strategic defense missiles and to make test and evaluation master plans discretionary for exempted systems.
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Service Specific Statutes

10 U.S.C. §§ 4501 and 9501	Industrial mobilization: orders; priorities; possession of manufacturing plants; violations (Army and Air Force)	Consolidate.
10 U.S.C. §§ 4502 and 9502	Industrial mobilization; plants; lists; Board on Mobilization of Industries Essential for Military Preparedness	Consolidate.
10 U.S.C. §§ 4501 and 9501	Procurement for experimental purposes	Consolidate.
10 U.S.C. §§ 4505 and 9505	Procurement of production equipment	Repeal.
10 U.S.C. §§ 4506 and 9506 10 U.S.C. §§ 4507 and 9507 10 U.S.C. § 4508	Sale, loan or gift samples, drawings and information to contractors Sale of ordinance stores to designers Test of iron, steel and other materials	Consolidate these five sections into one section and provide additional authority to sell.
10 U.S.C. §§ 4531 and 9531	Authorization (to purchase certain materials and facilities)	Repeal.
10 U.S.C. § 4533	Army rations	Repeal.
10 U.S.C. §§ 4535 and 9535	Exceptional subsistence supplies; purchase without advertising	Repeal.
10 U.S.C. §§ 4537 and 9537	Military surveys and maps: assistance of U.S. mapping agencies	Repeal.
10 U.S.C. §§ 4538 and 9538	Unserviceable ammunition: exchange and reclamation	Repeal.
10 U.S.C. §§ 4540, 9540 and 7212 10 U.S.C. 2855	Architectural and engineering services Law applicable to contracts for architectural and engineering services and construction design	Repeal Amend to permanently authorize procurement of A-E services; Amend section 2306 to delete the 6 percent fee limitation.
10 U.S.C. §§ 4541 and 9541	Gratuitous services of officers of the Army/Air Force Reserve	Consolidate.
10 U.S.C. §§ 9511, 9512 and 9513	(Civil Reserve Air Fleet (CRAF) Program) Definitions Contracts for the inclusion of defense features Commitment of aircraft to the Civil Reserve Air Fleet	Consolidate and amend to grant authority to contract with CRAF carriers for limited use of military airfields.
10 U.S.C. § 7201	Guided missiles; research and development, procurement, construction	Repeal.
10 U.S.C. § 7203	Scientific investigation and research	Amend and redesignate to provide scientific exchange authority.
10 U.S.C. § 7213	Relief of contractors and their employees from losses by enemy action	Repeal.
10 U.S.C. § 7230	Sale of degaussing equipment	Repeal.
10 U.S.C. § 7296	Appropriations (auxiliary naval vessels); available for other purposes	Repeal.
10 U.S.C. § 7298	Conversion of combatants and auxiliaries (naval vessels)	Repeal.
10 U.S.C. § 7299a	Construction of combatant and escort vessels and assignment of vessel projects	Amend to repeal obsolete and contradictory provisions.
10 U.S.C. § 7301	Bids on construction: estimates required	Repeal.
10 U.S.C. § 7302	Construction on Pacific Coast	Repeal.
10 U.S.C. § 7304 10 U.S.C. § 7305 10 U.S.C. § 7306 10 U.S.C. § 7307 10 U.S.C. § 7308	Examination by board; unfit vessels stricken from Naval Vessel Register Sale of vessels stricken from Naval Vessel Register Use for experimental purposes Restriction on disposal Transfer or gift of obsolete, condemned, or captured vessels	Consolidate the four sections with the exception of 7307(b) which should be repealed as superfluous.
10 U.S.C. § 7310	Policy in constructing combatant vehicles	Repeal.
10 U.S.C. §§ 7361-7367	Naval salvage facilities	Consolidate.

The Brooks Act and Warner Amendment

40 U.S.C. § 759 and 10 U.S.C. § 2315	Brooks Act and Warner Amendment: procurement of ADPE by GSA and certain exemptions for DOD.	No legislative recommendation, however consideration should be given to an increase in the blanket Delegation of Procurement Authority by GSA.
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DoD Commercial and Industrial Activities

10 U.S.C. § 2461 and 10 U.S.C. § 2462	Commercial and industrial type functions; required studies and reports before conversion to contractor performance. Contracting for certain supplies and services required when cost is lower	Amend to eliminate unnecessary requirements and consolidate into a single streamlined statute.
10 U.S.C. § 2463	Reports on savings or cost from increased use of DOD civilian personnel	Repeal.
10 U.S.C. § 2464	Core logistics functions	Amend to clarify authority of the Secretary of Defense to establish core requirements.
10 U.S.C. § 2465	Prohibition on contracts for performance of firefighting or security guard functions	Repeal.
10 U.S.C. § 2466	Limitations on the performance of depot level maintenance of material	Repeal.
10 U.S.C. § 2467	Cost comparisons: requirements with respect to retirement costs and consultation with employees	Consolidate with the current sections 2461 and 2462 and amend to vest the consultation requirement in the Secretary of Defense or the military service Secretaries.
10 U.S.C. § 2468	Military installations: authority of base commanders over contracting for commercial activities (Nichols Amendment)	Repeal.
10 U.S.C. §§ 4532 and 9532	Factories and arsenals: manufacture at; abolition of	Consolidate and amend to specify the authority of the Secretary of Defense.
10 U.S.C. § 2212	Contracted advisory and assistance services: accounting procedures	Repeal.

Fuel and Energy

10 U.S.C. § 2388	Liquid fuels, contracts for storage	Amend to provide separate authority to contract for storage or handling; add natural gas; vest authority in the Secretary of Defense and military service Secretaries. Repeal subsection (b) concerning protection of petroleum facilities as obsolete.
10 U.S.C. § 2404	Acquisition of petroleum, authority to waive procedures	Amend to provide authority to sell petroleum when in the public interest.

Fiscal Statutes

10 U.S.C. § 1552	Procedure for appropriation accounts available for definite periods ("M" accounts)	Amend to provide for waiver of cancellation of availability or obligation if the Secretary of Defense or the Secretary of a military department determines funds are required under open contracts, and Congress is notified annually thereafter as to balance remaining in each fixed appropriation account.
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Miscellaneous

U.S.C. § 2202	Obligation of funds: limitation	Amend to specify the authority of the Secretary of Defense to issue regulations for procurement, production, warehousing or distribution. Repeal subsection (b) as a redundant funding limitation set out elsewhere.
10 U.S.C. §§ 2271-2279	Encouragement of aviation	Repeal all sections as obsolete.
10 U.S.C. § 2369	Product evaluation activity	Repeal.
10 U.S.C. § 2384a	Supplies: economic order quantities	Repeal.
10 U.S.C. § 2385	Arms and ammunition: immunity from taxation	Amend to add heavy wheeled vehicles and trailers as items exempt from excise tax.

10 U.S.C. § 2389	Contracts for the procurement of milk: price adjustments, purchases from the Commodity Credit Corporation	Repeal.
10 U.S.C. § 2402	Prohibition of contractors limiting subcontractor sales directly to the United States	Amend to delete requirement for contract clause
Pub. L. 101-510 § 9081	18-month lease restriction on vessels, vehicles, or aircraft	Repeal.

Chapter 4 Socioeconomic Laws, Small Business and Simplified Acquisition Threshold

Simplified Acquisition Threshold: See Tables V and VI

Labor and Equal Opportunity

10 U.S.C. § 7299	Contracts: Application of Public Contracts Act	Amend to retain exclusion of ship construction and repair from Davis-Bacon and Service Contract Acts
29 U.S.C. § 793	Employment under federal contracts	Amend to conform to the simplified acquisition threshold (\$100,000) from \$10,000 and to create an exemption for commercial items.
38 U.S.C. § 4212	Veteran's employment emphasis under federal contracts	Amend to conform the threshold to the simplified acquisition threshold (\$100,000) from the current \$10,000 threshold and to create an exemption for commercial items.
40 U.S.C. § 207a <i>et seq</i>	The Miller Act	Amend to conform the threshold to the simplified acquisition threshold from the current \$25,000 threshold.
40 U.S.C. § 267a <i>et seq</i>	The Davis-Bacon Act	Amend to conform the threshold to the simplified acquisition threshold from current \$2,000 threshold Amend reporting requirements and lengthen frequency of wage schedules publication to annually.
40 U.S.C. §§ 35-45 <i>et seq</i>	The Walsh-Healey Public Contracts Act	Repeal.
41 U.S.C. §§ 351-358	Service Contract Act	Amend to conform the threshold to the proposed simplified acquisition threshold from the current \$2,500 threshold.
41 U.S.C. § 701	Drug-free workplace for federal contractors	Amend to conform the threshold to the proposed simplified acquisition threshold from the current \$25,000 threshold and to create an exemption for commercial items.

Small and Disadvantaged Business Preferences

15 U.S.C. § 631 <i>et seq</i>	Small Business Act	Amend section 637 to permit contracting officers to negotiate directly with eligible 8(a) firms rather than dealing through the Small Business Administration. Amend section 637 to conform to simplified acquisition threshold
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Chapter 5 Intellectual Property

Technical Data

10 U.S.C. §§ 2320-2321 and 41 U.S.C. § 403	Rights in technical data and validation of proprietary data restrictions	Amend section 2320 to: more clearly define when technical data is to be delivered and to provide for regulations setting out the rights of the government and its contractors in that data; delete the requirement for written assurances of complete and accurate data; comport policy on commercial items to statute; and allow Secretary of Defense the flexibility to use any technical data policy that would meet the government's reprocurement needs. Amend 41 U.S.C. § 403 to more clearly define technical data to include computer data bases and manuals and to exclude computer programs.
15 U.S.C. §§ 3701-3710d	Technology innovation (Stevenson-Wydler Technology Transfer Act and the Federal Technology Act)	Amend 15 U.S.C. § 3710a to: provide that government agencies may secure copyright registration for the United States in computer programs prepared by civilian and military employees in performance of their official duties under or related to cooperative research and development agreements; establish procedures for securing copyright, licensing, and sharing royalties with employees for copyrightable works; permit government employees under certain conditions to secure copyright, license and share in royalties for copyrightable works; and permit laboratory employees to help in commercializing copyrighted work made while in government service if they had no participation in the selection of the other party to the cooperative research and development or in negotiation of the licensing agreement.
10 U.S.C. § 2363	Encouragement of technology transfer	Repeal.
35 U.S.C. §§ 200-212	Patent rights in inventions made with federal assistance	Amend section 202 to: require contractors to disclose each invention within a reasonable time, but in any event prior to publication; provide that contractors specifically state their election to retain title to an invention in the United States and foreign countries; provide that where publication, sale, or public use, has initiated the one-year statutory period in which valid patent protection can still be obtained in the United States the period for election may be shortened by the federal agency to a date that is not more than four months prior to the end of the statutory period; and provide that whenever contractors elect to retain title, they must file a patent application within one year of election (or an additional time as approved by the federal agency).

Competitiveness of United States Companies

35 U.S.C. §§ 181-188	Secrecy of certain inventions and filing applications in foreign countries	Amend section 181 to establish a Patent and Trademark Technical Advisory Committee within DOD to review and administer the imposition of secrecy orders. Amend section 183 to provide compensation only for periods of delay as a result of a grant of a secrecy order which exceed five years. (Amendment to 35 U.S.C. § 155 is also recommended to extend the term of any patent delayed by a grant of a secrecy order for a period equal to the delay but not to exceed five years.)
22 U.S.C. § 2761e	Charges; reduction or waiver (Foreign Military Sales Recoupment)	Repeal.

Government Use of Private Patents, Copyrights and Trade Secrets

28 U.S.C. § 1498	Patent and copyright cases	Amend to provide the Secretary of Defense authority to issue regulations prescribing when a contracting officer may withhold from a contractor authorization and consent to use (and potential infringement) of a patent of a third party.
10 U.S.C. § 2386	Copyrights, patents, designs, etc., acquisition	Amend to broaden and modernize the section to cover technical data and computer software rather than "designs processes and manufacturing data."
10 U.S.C. § 7210	Purchase of patents, patent applications, and licenses	Repeal.

Chapter 6 Standards of Conduct

Civil Fraud

31 U.S.C. §§ 3729-3732	False Claims Act (<i>Qui Tam</i>)	Amend section 3730 to: prohibit <i>qui tam</i> suits based on information obtained by the relator in the course or scope of official government duties or employment; tighten the prohibition against "parasitic suits"; prohibit <i>qui tam</i> actions based on voluntary disclosures and limit compensation to culpable defendants. Amend the Contract Disputes Act to permit disputes to be processed in the absence of a contracting officer's final decision within the discretion of a board or the Court of Federal Claims. Amend section 3729 to: permit transfer to the Court of Federal Claims and to permit claims to be heard as counterclaims in district courts; and avoid unreasonable penalties.
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Ethics

18 U.S.C. § 207	Restrictions on former officers, employees, and elected officials of the executive and legislative branches	Amend section to add a one-year restriction on representing or advising others concerning certain protected procurement-related information.
10 U.S.C. § 2397a	Requirements relating to private employment contacts between certain DOD procurement officials and defense contractors	Repeal.
18 U.S.C. § 281	Restriction on retired military officers regarding certain matters affect the government	Repeal.
37 U.S.C. § 801	Restriction on payment to certain officers	Repeal.
10 U.S.C. § 2397	Employees or former employees of defense contractors; reports	Repeal.

10 U.S.C. § 2397b	Certain former DOD procurement officials: limitation on employment	Repeal.
10 U.S.C. § 2397c	Defense contractors: requirements concerning former DOD officials	Repeal.
41 U.S.C. § 423	Procurement integrity	Repeal and replace with proposed provisions relating to the disclosure of bid, proposal, or source selection information.

Procurement Policy

41 U.S.C. § 403	Definitions (OFPP Act)	Amend to substitute the term "simplified acquisition threshold" for "small purchase threshold." Amend to change the definition of "technical data" to include computer data bases and manuals and other supporting computer data.
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Other Related Statutes

31 U.S.C. § 1352	Limitation on use of appropriated funds to influence certain federal contracting and financial transactions (Byrd Amendment)	Repeal.
10 U.S.C. § 2408	Prohibition on persons convicted of defense-contract related felonies and related criminal penalty on defense contractors	Repeal.
10 U.S.C. § 2409a	Protection of whistle blowers	Repeal.

Chapter 7

Purchases of Foreign Goods by the Department of Defense

41 U.S.C. §§ 10a-10d	Buy American Act Domestic Source Restrictions Domestic Source Preferences	Amend to substitute "substantial transformation" test of 19 U.S.C. § 2518 for current test of U.S. origin. Repeal debarment provisions in favor of standard administrative debarment procedures. Repeal the following congressionally-mandated domestic source restrictions and product preferences * Jewel Bearings [Pub. L. No. 90-469 and 101-511, § 8121] * Food, Clothing, Fabrics, Specialty Metals, and Hand or Measuring Tools [Pub. L. No. 97-377, § 723] * Night Vision Devices [Pub. L. No. 101-511, § 8054] * Floating Storage of Petroleum [Pub. L. No. 101-511, § 8020] * Anchor and Mooring Chain [Pub. L. No. 100-202, § 8125, 101-165, § 9051, and 101-511, § 8041] * PAN Carbon Fibers [Pub. L. No. 101-511, § 8048]
10 U.S.C. § 2506 renumbered as § 2533	Limitation on use of funds; procurement of goods which are other than American goods	Amend section 2506 by striking the heading "Limitation on use of funds; procurement of goods which are other than American goods" and inserting in lieu thereof, "policy on Purchases of Foreign Goods." Amend subsection (a) by striking the reference to subsection (c); and amend by adding new paragraphs (a)(7), (a)(8), and (a)(9), which add as policy factors the impact of foreign purchases in the defense technology and industrial bases and on national security. Amend subsection (b) to incorporate the "substantial transformation test" of 19 U.S.C. § 2518.
10 U.S.C. § 2507 renumbered as § 2534	Miscellaneous procurement limitations	Amend section 2507 by striking the heading "Miscellaneous procurement limitations" and inserting in lieu thereof, "Items restricted to American sources." Amend various sections to incorporate product restrictions (e.g., large-bore cannon) which today appear in scattered sections of law.

10 U.S.C. § 4542	Technical data packages for large-caliber cannon: prohibition on transfers to foreign countries; exception	Consolidate section 4542 into 10 U.S.C. § 2507a as new subsection 2x12(i).
10 U.S.C. § 7309	Restrictions on construction or repair of vessels in foreign shipyards	Consolidate section 7309 into 10 U.S.C. § 2507 as new subsection 2x12(j).
10 U.S.C. § 2631 and 46 U.S.C. App. § 1241	Cargo Preference Act of 1904 Cargo Preference Act of 1954	Create exemptions to 10 U.S.C. § 2631 and 46 U.S.C. App. § 1241 for commercial items and simplified acquisition.
10 U.S.C. § 2327	Contracts: consideration of national security objectives	Repeal.

International and Cooperative Agreements

10 U.S.C. § 2504 renumbered as § 2531	Defense memoranda of understanding and related agreements	Amend throughout to change "memorandum of understanding" to "international agreement" and to add "logistics support" to areas of permitted international cooperation.
10 U.S.C. § 2350a	Cooperative research and development projects: allied countries	Consolidate sections 2350a and 2350b as new section 2x31. Consolidate definitions contained in clause 2350a(i) into new section 2x20.
10 U.S.C. § 2350b	Cooperative projects under Arms Export Control Act: acquisition of defense equipment	Consolidate sections 2350a and 2350b as new section 2x31.
10 U.S.C. § 2350i	Foreign contributions for cooperative projects	Retain and consolidate section 2350i in new section 2x21. Consolidate definitions contained in subsection 2350i(c) into new section 2x20.
10 U.S.C. § 2350d	Cooperative logistic support agreements: NATO countries	Amend section 2350d by striking subsections (d) and (e). Consolidate definitions contained in subsection 2350d(c) into new section 2x20.
10 U.S.C. § 2350h	Memorandums of agreement: Department of Defense ombudsman for foreign signatories	Repeal.
10 U.S.C. § 7344	Suspension of construction in case of treaty	Repeal.
10 U.S.C. §§ 2341 through 2350	Acquisition and Cross-Servicing Agreements, Subchapter I, Cooperative Agreements With NATO Allies and Other Countries	Amend paragraph 2324(a)(1) by striking the phrase "and after consultation with the Secretary of State." Amend subsection 2343(a) by striking the phrase "chapter 137 of this title and provisions of this subchapter" after the words "made in accordance with" and substituting the phrase "prudent procurement practices." Amend section 2347 by adding a new paragraph: "(c) when the Secretary of Defense certifies that the armed forces of the United States are, or imminently shall become, involved in a contingency operation, the restrictions set forth in subsections (a) and (b) above are waived for a period not to exceed 180 days." Amend section 2350 by adding the definition "contingency operation" with the same meaning provided that term in section 631 of the FY92/93 Defense Authorization Act (P.L.102-190) (10 U.S.C. § 101(47)).
10 U.S.C. § 2350f	Procurement of communications support and related supplies and services	Amend to consolidate in new section 2x50. Consolidate definitions contained in subsection 2350f(d) into new section 2x50.
10 U.S.C. § 2350g	Authority to accept use of real property, services, supplies from foreign countries in connection with mutual defense agreements and occupational arrangements	Amend section 2350g by adding new paragraph (a)(3) and new subsection (b). (The amended section would provide needed flexibility to SECDEF in the administration and execution of mutual defense agreements and occupational arrangements, as well as authority to go beyond international courtesies and outside cross-servicing arrangements for needed logistical support and increased allied burden sharing), consolidate as new section 2x60.

Chapter 8: Commercial Items — See Tables II and III

TABLE II
COMMERCIAL ITEMS: STATUTES RECOMMENDED FOR EXEMPTION ¹

Statute	Regulations Based on Statute	Flow down	Description of Regulations	Reasons for Commercial Item Exemption	Ch
10 U.S.C. § 2393	52.209-5 and -6	Yes to first tier	Prohibits prime contractor from using debarred or suspended subcontractors.	Prohibition on doing business with debarred or suspended prime contractors is not a problem. A commercial seller will often have established its sources of supply or subcontractors prior to sale to the government. Therefore, exemption from subcontractor approval provisions is required.	6.11
10 U.S.C. § 2402	52.203-6	Yes	Prohibits primes from entering into any agreement with subcontractor which prevents subcontractor from selling any item or process directly to the United States.	The flow down is not consistent with commercial practices, in which subcontractor system will be established before a contract is awarded. If the United States needs direct purchase of subcontracted items, let it negotiate for them. The Panel's primary recommendation is that this statute be repealed.	3.9
10 U.S.C. § 2408	252.203-7001	Yes to first tier	Prohibition of employment of persons convicted of fraud.	Commercial sellers should be able to utilize their established employees in performing government contracts. There is no reason to burden commercial sellers with need to screen employees when they get an occasional government contract.	6.4
10 U.S.C. § 2507	DFARS Part 225	No	Section 2507 contains specific U.S. source restrictions applicable to the acquisition of identified products.	To the extent that this section requires sellers of commercial items to vary the source of components, it interferes with the ability of DOD to buy those items. The Panel has recommended a complete revision of this section, which would include a repeal of most restrictions currently contained in section 2507. However, an exemption is required from the remaining restrictions.	7.1
10 U.S.C. § 2631	252.247-7022, -7023, -7024	Yes--regs seem to flow down; statute does not	Requires transportation of items by sea in U.S. Flag vessels.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing government contracts.	7.1

¹The Panel made great efforts to identify every statute that might create a barrier to commercial items. While an exhaustive effort has been made to identify relevant statutes, it is possible that one or more may have been missed. The statutes reviewed by the Panel are set out in Appendix D of its Report.

15 U.S.C. § 637(d)	52.219-8; -9; -16; 19.705; 19.708; 226.7; 252.211.-7003; -7020	Yes	Subcontracting with small and small disadvantaged businesses; small business subcontracting plans; liquidated damages. Section 637(d) requires that small businesses be given the "maximum practicable opportunity" to participate in government contracts as subcontractors and mandates that the clause set out in section 637(d)(3) be placed in all contracts other than small purchase contracts, personal service contracts, and contracts to be performed outside of the United States. Section 637(d)(4) mandates the negotiation of a small and minority subcontracting plan in all negotiated procurements in excess of \$500,000. Adherence to the plan is policed by liquidated damages. There is no exemption for contracts for commercial items.	There is no problem with the policy prescribed by section 637(d)(3). In negotiated procurements of commercial items, the subcontracting plan mandated by section 637(d)(4) may well conflict with the established subcontracting arrangements of the commercial supplier and is obviously impractical when goods are sold to the government from inventory. While section 647(d)(4)(B)(iv) limits use of the clause to situations "which offer subcontracting possibilities," comments received from industry indicate that this exception is not being properly applied to exempt even shipments of commercial items from inventory. For the same reason, commercial item contracts should be exempt from section 637(d)(5), which essentially extends the requirements in section 637(d)(4) to contracts awarded through competition, and section 637(d)(6) which contains the clauses implementing section 637(d)(5). The Panel recommends, therefore, express exemptions to sections 637(d)(4), 637(d)(5), and 637(d)(6) for commercial item contracts.	4.3
15 U.S.C. §§ 644(d), (e), and (f)	52.220-3; -4	Yes	Preference for labor surplus area contracting. Requires U.S. to give priority to small and labor surplus area contractors. Subcontracting plan required for negotiated contracts over \$500,000.	The regulations create a subcontracting obligation that is inconsistent with normal commercial practices, in which subcontracts are arranged well in advance of shipments. The regulations do not contain any exemption for commercial items. While the regulations do not appear to be required by 15 U.S.C. § 644, the regulation writers seem to think otherwise. To avoid any doubt, therefore, an exemption is granted.	4.3
29 U.S.C. § 793	52.222-36	Yes	Rehabilitation Act of 1973; requires affirmative action to employ and advance handicapped individuals. Act applies to companies with 50 or more employees or annual U.S. contracts of \$50,000 or more.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing government contracts. Especially since discrimination against the handicapped is prohibited for all employers under Americans with Disabilities Act, there should be an exemption for commercial items.	4.2
31 U.S.C. § 1352 note	52.203-11; -12	Yes	Byrd Amendment.	Probably does not apply to commercial suppliers with respect to contracts for commercial supplies, but should be exempted for clarity.	6.11
38 U.S.C. § 4212	52.222-35	Yes	Affirmative action for disabled and Vietnam-era veterans.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing government contracts. In addition, this statute has a sunset provision and will no longer be a requirement after 1994.	4.2

41 U.S.C. §§ 51-58	52.203-7	Yes	Anti-Kickback Act; prohibits payments from any subcontractor to any prime or any employee of the prime; violation voids contract.	While many companies may prohibit some forms of payments by subcontractors to employees, commercial practice typically permits some forms of gratuities (such as meals or entertainment) that will be prohibited by this law. Accordingly, it constitutes too much of a burden for commercial seller to "police" existing supplier networks to ensure compliance for occasional government contracts.	6.11
41 U.S.C. § 701	52.223-5; -6	Yes	Drug-free Workplace certifications. This section requires employers to establish drug-free awareness programs and to report any convictions by their employees for drug-related offenses.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing government contracts.	4.2
46 U.S.C. App. 1241(b)	52.247-64	Not in statute; flow down in regs.	Preference for U.S. Flag Vessels; requires 50 percent or more of gross tonnage of materials and equipment procured under government contracts be transported in U.S. Flag vessels.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing government contracts.	7.1

TABLE III
COMMERCIAL ITEMS: STATUTES RECOMMENDED FOR AMENDMENT OR REPEAL

Current Statute	Regulations Based On Statute	Flow down	Description of Regulations	Comments	Ch
10 U.S.C. § 2306a	252.211-7010-7011; 52.215-22; 52.215-23	Yes	Truth in Negotiations Act (TINA); Price reduction for defective cost or pricing data—contract modifications; audit of cost or pricing data.	Proposed 2xx5 provides an additional source of authority for pricing purchases of commercial items. Even as amended by the Panel, section 2306a is not adequate to provide a complete solution for commercial items. If the Panel's proposed section 2xx5 is not adopted, some other comprehensive amendment to section 2306a as currently drafted will be required since there is little doubt that the provisions of section 2306a create the single greatest impediment to the purchase of commercial items.	1.3
10 U.S.C. § 2313	52.215-1; 52.215-2	Yes	Examination of books and records of contractor by DOD.	Proposed section 2xx5(d) is intended to provide the government's exclusive audit right under a contract. See the discussion of section 2xx5(d) for the rationale.	2.3
10 U.S.C. § 2313(b)	252.211-7011	Yes	This section requires contractor to permit GAO audit of any books, documents, papers, or records of contractor or subcontractor relating to a negotiated contract.	Proposed section 2xx5(d) is intended to provide the government's exclusive audit right under a contract. See the discussion of section 2xx5(d) for the rationale.	2.3
10 U.S.C. § 2320-21	252.211-7015 through 7017	Yes	Rights in technical data and computer software.	The requirements of these statutes are inconsistent with normal commercial practices on data rights. The Panel has proposed specific amendments to section 2320 (which have the effect of modifying the coverage of section 2321 as well) to deal with this problem. If these amendments are not adopted, then exemption will be required.	5.1
10 U.S.C. § 2324	252.231-7001	No	Allowable costs under defense contracts; prescribes costs that may be incurred in overhead pools: Penalties for unallowable costs.	The Panel has recommended that the detailed provisions on cost allowability contained in this section be repealed since they have been implemented in regulation for many years. If this course is adopted, there is no need for an exemption. In addition, because the Panel has recommended that commercial items be purchased solely under fixed price contracts, this section will have little or no applicability to commercial items as proposed. Should flexibly priced contracts be used to purchase commercial items, commercial sellers might have to be exempted from the detailed cost principles contained in this section because it would require changes to a commercial seller's established accounting system.	2.2

10 U.S.C. § 2384	Part 217.7300	No	Requires seller to mark supplies with name of seller, national stock number, and contractor part number; if seller is not the manufacturer, statute requires item to be marked with name of actual manufacturer. There is an exemption for commercial items purchased competitively or at an established catalog or market price.	Section 2384(b) contains an exemption for items sold under the market or catalog price exemption in TINA. This is not broad enough to accommodate all commercial items, so that an exemption to section 2384(b) is required to implement the Panel's commercial item approach and such an amendment has been recommended by the Panel. If 2384 (b) is amended as proposed, then there is no need for an exemption.	1.6
10 U.S.C. § 2397	252.203-7000		Prohibition on Compensation to Former DOD Employees.	The Panel has recommended repeal. Reports intended to identify employees switching sides between DOD and major defense firms; useless paperwork burden in commercial context.	6.7
10 U.S.C. § 2397a	252.203-7000		Prohibition on Compensation to Former DOD Employees.	The Panel has recommended repeal. Restrictions on job negotiations with defense contractors; duplication of other law and would unnecessarily burden commercial practices.	6.6
10 U.S.C. § 2397b	252.203-7000		Prohibition on Compensation to Former DOD Employees.	The Panel has recommended repeal. Forbids plant representatives and senior defense negotiators from working for major defense firms; cost of screening for occasional retirees would far exceed return for commercial sellers.	6.7
10 U.S.C. § 2397c	252.203-7000		Prohibition on Compensation to Former DOD Employees.	The Panel has recommended repeal. Reports and penalties for the foregoing section 2397 restrictions would have no independent purpose.	6.7
10 U.S.C. § 2406	252.215-7001	No	Contractor records; requires contractor to permit access to records relating to cost or pricing data under covered contracts, which are major weapons systems contracts where 10 U.S.C. § 2306a is applicable.	The Panel has proposed that section 2406 be repealed as part of consolidating all audit statutes into a revised version of 10 U.S.C. § 2313. If the Panel's proposal is not adopted, then an exemption would be required for commercial items.	2.3
10 U.S.C. § 2506	25.1 and 25.2	Yes	DOD variant of Buy American Act using component test to identify "American" product.	Application of current component-oriented Buy American Act restrictions to commercial buying may irrationally exclude items DOD wants to procure. If Buy American Act is modified as the Panel has recommended to include "substantial transformation" test, then should not be a problem.	7.1
41 U.S.C. §§ 10a-10d	25.1 and 25.2	Yes	Buy American Act.	Applications of current component-oriented Buy American Act restrictions to commercial buying may irrationally exclude items DOD wants to procure. If executive order implementing Buy American Act is modified to include "substantial transformation" test or if Panel substitute is adopted, then should not be a problem.	7.1

41 U.S.C. § 422	52.230; 3-4	Yes	Cost Accounting Standards (CAS); Cost Accounting Standards Board (CASB).	Statute establishes CASB and provides broad authority to the Board to promulgate regulations. 41 U.S.C. § 422(f)(2) exempts contracts and subcontracts based on established catalog or market prices (as defined in TINA) from CAS coverage. This exemption should be broadened to include commercial items as defined in proposed section 2302. In addition, section 422(k) should be changed to clarify that it has no application to contracts for commercial items even though such items may be made by a company that must comply with CAS because it furnishes CAS-covered items as well as commercial items. The Panel has recommended that the CASB make modifications through its rule-making functions since it has authority to create classes of exemptions. See generally Chap. 2.4 of the report. If the CASB does not take such action, then an exemption would be required.	2.4
41 U.S.C. § 423	52.203-8;-9;-10	No	Procurement Integrity Act—Requirement for certificate of procurement integrity.	The certifications required by this section cannot be imposed without a major administrative burden of tracking all procurement integrity restrictions, which are totally inconsistent with commercial practices and should not apply. The Panel has recommended as its primary recommendation that this statute be repealed and replaced by totally new language and that its fundamental prohibition on the improper use of private information be incorporated in this section and in 18 U.S.C. § 207. If that proposal is adopted, there would be no need for an exemption from either the new section 423 or the proposed section 207.	6.9

TABLE IV
DOD PRIME CONTRACT ACTIONS BY SIZE: FY 1991
(Contracts over \$25,000; Dollar Amounts in Millions)

SIZE IN DOLLARS		TOTAL		PERCENT	
BY CONTRACT		NUMBER	\$AMOUNT	NUMBER	\$AMOUNT
25,000-	49,999	65,482	2,043	28.6	1.6
50,000-	99,999	58,549	3,643	25.5	2.9
100,000-	199,999	38,689	4,802	16.9	3.8
200,000-	299,999	17,329	3,676	7.6	2.9
300,000-	499,999	17,492	5,859	7.6	4.6
500,000-	999,999	14,339	8,281	6.3	6.6
1,000,000-	1,999,999	8,150	9,269	3.6	7.3
2,000,000-	2,999,999	3,044	5,828	1.3	4.6
3,000,000-	4,999,999	2,551	8,156	1.1	6.5
5,000,000-	9,999,999	1,938	11,605	0.8	9.2
10,000,000-	or more	1,755	63,134	0.8	50.0

Source: DOD (Washington Headquarters Services, Directorate for Information Operations and Reports)

TABLE V

STATUTES TO BE RETAINED BUT NOT TO BE IMPLEMENTED BY CONTRACT CLAUSE

Statute	Regulation(s)	Code ¹	Description of Statute or Regulations
10 U.S.C. § 2207	52.203-3	3	Gratuities
10 U.S.C. § 2306(b)	52.203-5	3	Covenant against contingent fees.
10 U.S.C. § 2397b	252.203-7000	4	Prohibition on compensation to certain former DOD employees.
10 U.S.C. § 2402	52.203-6	3	Prohibits primes from entering into any agreement with subcontractor which prevents subcontractor from selling any item or process directly to the United States.
22 U.S.C. § 2370	52.225-11	3	Prohibition on assistance to certain countries.
31 U.S.C. § 1352 note	52.203-11; -12	3	Byrd Amendment
41 U.S.C. § 22	52.203-1	3	Officials not to benefit.
41 U.S.C. § 35-45		3	Walsh-Healey Public Contracts Act ²
41 U.S.C. § 57	52.203-7	2,3,6	Anti-Kickback Act; prohibits payments from any subcontractor to any prime or any employee of the prime; violation voids contract.

¹The codes in this column mean the following:

1. Requires contractor to provide information or report.
2. Requires contractor to: establish procedures or prepare and retain records, but does not require a report unless a violation occurs.
3. Requires no action other than compliance with statute.
4. Individual required to report; contractor not required to report.
5. Representation/certification/notification by contractor required.
6. Contractor required to request authority to take designated action(s).
7. Requires modification of contractors business methods or systems.

²The Panel has recommended that the Walsh-Healey Act be repealed. See Chap. 4.2.3. of the Report.

TABLE VI
STATUTORY EXEMPTION FOR CONTRACTS UNDER \$100,000

Statute	Regulation(s)	Code	Description of Statute or Regulations
10 U.S.C. § 2313	15.106.1, -2; 52.215-1, -2	1, 2, 7	See the discussion at section 2.3.2 of the report.
10 U.S.C. § 2384(b)	217.7300 252.217-7026	1	Requires disclosure of actual manufacturer of component parts.
10 U.S.C. § 2393	52.209-5 and -6	5	Prohibits prime contractor from doing business with debarred or suspended subcontractors.
10 U.S.C. § 2397	252.203-7000	3, 4	Reports by former DOD employees. ¹
10 U.S.C. § 2397a	252.203-7000	3, 4	Reporting of employment contacts by DOD employees. ²
10 U.S.C. § 2397c	252.203-7000	4	Prohibition on compensation to former DOD employees. ³
10 U.S.C. § 2408	252.203-7001	3	Prohibition of employment of persons convicted of fraud.
10 U.S.C. § 2506	25.1 and 25.2	3	DOD variant of Buy American Act using component test to identify "American" product. ⁴
10 U.S.C. § 2507	25.1 and 25.2	3	Section 2507 contains specific U.S. source restrictions applicable to the acquisition of identified products. ⁵
10 U.S.C. § 2631	252.247-7022, -7023, -7024	5 6 5	Requires transportation of items by sea in U.S. Flag vessels.
18 U.S.C. § 874; 40 U.S.C. § 276(c)	52.203-7	2	Anti-kickback procedures.
18 U.S.C. § 4082(c)(2); Pub. L. No. 89-176	52.222-3	3	Use of convict labor.
29 U.S.C. § 793	52.222-36	3, 7	Rehabilitation Act of 1973; requires affirmative action to employ and advance handicapped individuals. Act applies to companies with 50 or more employees or annual U.S. contracts of \$50,000 or more.
38 U.S.C. § 4212	52.222-35; 52.222-37	3, 7	Affirmative action for disabled and Vietnam era veterans; reports of employment of Vietnam era veterans.
40 U.S.C. § 276a to § 276a-7	22.400	1, 7	Davis-Bacon Act
40 U.S.C. §§ 327-333; 28 U.S.C. § 1499	22.300; 52.222-4	3, 7	Work Hours and Safety Act of 1962; overtime compensation.
41 U.S.C. §§ 10a-10d	25.1 and 25.2	3, 7	Buy-American Act

¹This provision does not apply below the small purchase threshold today. See 10 U.S.C. § 2307(a)(1). It should be amended to exempt contracts below the simplified acquisition threshold.

²This provision does not apply below the small purchase threshold today. See 10 U.S.C. § 2307a(a)(1), incorporating by reference *id.* § 2397(a)(1). It should be amended to exempt contracts below the simplified acquisition threshold.

³This section today applies only to contracts greater than \$100,000. See 10 U.S.C. § 2397c(a)(1). The reference in the statute to "\$100,000" should be changed to "simplified acquisition threshold."

⁴The Panel has recommended changing from the component test for compliance with the Buy American Act and 10 U.S.C. § 2506 to the "substantial transformation" test used by the Trade Agreements Act. If this amendment is made, then there is no need to exempt simplified purchases from compliance. See generally Chapter 7 of the Report.

⁵The Panel has recommended repeal of most of the source restrictions contained in 10 U.S.C. § 2507. If the Panel's recommendations are adopted, then there is no need to exempt simplified purchases from this section. See generally Chapter 7 of the Report.

41 U.S.C. §§ 351-358	52.222-40; -41; -42	1, 2, 7	Service Contract Act
41 U.S.C. § 423	52, 203-8	3	Procurement Integrity ¹
41 U.S.C. § 701	52.223-5; -6	3, 7	Drug-free Workplace certifications. This section requires employers to establish drug-free awareness programs and to report any convictions by their employees for drug-related offenses.
46 U.S.C. § 1241(b)	52.247-64	1,7	Preference for U.S. Flag Vessels; requires 50 percent or more of gross tonnage of materials and equipment procured under government contracts be transported in U.S. flag vessels.

¹The reporting provisions of this section do not apply below \$100,000. See 41 U.S.C. § 423(e)(7). The Panel recommends that "\$100,000" be changed to "simplified acquisition threshold."